DECISIONS AND REPORTS ON RULINGS OF THE ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

Pursuant to Executive Order 11491

Volume 2

January 1, 1972, through December 31, 1972

This Volume includes Assistant Secretary Decisions Nos. 123 - 234 and Reports on Rulings Nos. 44 - 52.

U. S. DEPARTMENT OF LABOR
Labor-Management Services Administration

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U.S. DEPARTMENT OF LABOR
Peter J. Brennan, Secretary

LABOR-MANAGEMENT SERVICES ADMINISTRATION
Paul J. Fasser, Jr.,
Assistant Secretary of Labor for Labor-Management Relations

OFFICE OF FEDERAL LABOR-MANAGEMENT RELATIONS
Louis S. Wallerstein, Director

PREFACE

This Volume of Decisions and Reports on Rulings of the Assistant Secretary of Labor for Labor-Management Relations Pursuant to Executive Order 11491*, covers the period from January 1, 1972, through December 31, 1972. 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. 123 - 234); and (2) Reports on Rulings of the Assistant Secretary (originally referred to as Reports on Decisions), which are published summaries of significant or precedent-setting rulings by the Assistant Secretary on requests for review of actions taken at the field level (R A/S Nos. 44 - 52).

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*Executive Order 11491 was amended by Executive Order 11616 on August 26, 1971, and by Executive Order 11636 on December 17, 1971.

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TYPE OF CASE

AC = Amendment of Certification
CU = Clarification of Unit
DR = Decertification of Exclusive Representative
OBJ = Objections to Election
RO = Certification of Representative (Labor Organization Petition)
S = Standards of Conduct
ULP = Unfair Labor Practice

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NUMERICAL TABLE OF REPORTS ON RULINGS OF THE ASSISTANT SECRETARY, SHOWING DATE ISSUED AND TYPE OF CASE

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TYPE OF CASE

CHALL = Challenged Ballots Resolution
OBJ = Objections to Election
REP = Representation Matters
RO = Certification of Representative (Labor Organization Petition)
ULP = Unfair Labor Practice

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1/ To facilitate reference, listings in this Table contain only key words in the Activity's title. For complete and official case captions see Numerical Table of Cases on page 1.

DECISIONS

OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

Nos. 123 - 234

January 1, 1972, through December 31, 1972

January 13, 1972

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

MISSISSIPPI NATIONAL GUARD,
172ND MILITARY AIRLIFT GROUP
(THOMPSON FIELD)
AND
MISSISSIPPI NATIONAL GUARD
(CAMP SHELBY)
A/SLMR No. 123

This case arose as a result of petitions filed by the International Union of Electrical, Radio and Machine Workers, AFL-CIO, and its National Army-Air Technicians Association, Local 676 (IUE), and by the American Federation of Government Employees, AFL-CIO, Local 3151 (AFGE). The IUE sought a unit of Wage Board (WB) technicians employed by the Mississippi National Guard in the 172nd Military Airlift Group, at Thompson Field, Jackson, Mississippi, excluding, among others, all General Schedule (GS) employees. The AFGE sought a unit of all technicians employed by the Activity at Camp Shelby, Mississippi employed in the Annual Training Equipment Pool, the Combined Support Maintenance Shop, the Organizational Maintenance Shop No. 6, and the United States Property and Fiscal Office. The Activity took the position that neither unit petitioned for was appropriate for the purpose of exclusive recognition, and asserted that the only appropriate unit herein should include all technicians employed by the Activity.

With respect to the unit sought by the IUE, the Assistant Secretary found that the record did not support a finding that the Wage Board (WB) technicians employed at the 172nd Military Airlift Group, stationed at Thompson Field, Jackson, Mississippi, enjoyed a community of interest, separate and distinct from other employees of the Activity. In this regard, the Assistant Secretary noted that the record revealed that GS technicians as well as the WB technicians employed by the Activity are hired subject to the same regulations; share common supervision; are subject to uniform personnel policies and practices; and technicians are able to transfer from location to location and from unit to unit. In addition, it was noted that WB technicians at the 172nd Military Airlift Group performed related or, in some instances, exactly similar tasks and interchange with each other; that there is transfer of personnel between GS and WB technician status; and that there is interchange with personnel assigned to the other air fields of the Activity. In these circumstances, the Assistant Secretary, dismissed the petition filed by the IUE.

With respect to the unit sought by AFGE, the Assistant Secretary found that the technicians in the petitioned for unit did not share a community of interest, separate and distinct from other employees of the Activity. In this regard, the Assistant Secretary noted that all of the Activity's technicians are hired subject to uniform regulations; that they are all under the command of the Adjutant General of Mississippi; that they share in a common mission; that they are subject to uniform personnel practices and policies; that there are transfers of personnel from unit to unit, as well as from location to location; and that there is evidence that personnel in the petitioned for unit are regularly sent on temporary duty to other locations to perform their tasks in cooperation with other technicians assigned to those locations. In these circumstances, the Assistant Secretary dismissed the petition filed by the AFGE.

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UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

MISSISSIPPI NATIONAL GUARD,
172ND MILITARY AIRLIFT GROUP (THOMPSON FIELD)

Activity

and Case No. 41-1723(RO)

INTERNATIONAL UNION OF ELECTRICAL, RADIO
AND MACHINE WORKERS, AFL-CIO and its
NATIONAL ARMY-AIR TECHNICIANS ASSOCIATION,
LOCAL 676

Petitioner

MISSISSIPPI NATIONAL GUARD
(CAMP SHELBY)

Activity

and Case No. 41-1741(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3151 1/

Petitioner

SUPPLEMENTAL DECISION AND ORDER

Upon petitions duly filed under Section 6 of Executive Order 11491, a consolidated hearing was held in the subject cases. Thereafter, on April 2, 1971, I issued a Decision and Remand, 2/ in which I found that Mississippi National Guard technicians are employees within the meaning of Section 2(b) of the Order. Also, I remanded the subject cases to the appropriate Regional Administrator to reopen the record solely for the purpose of receiving evidence concerning the appropriateness of the units sought. On June 29 and July 20, 1971 a further hearing was held before Hearing Officer Seymour X. Alsher. The Hearing Officer's rulings made at the reopened hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this matter, including the facts developed at the hearings held both prior and subsequent to the remand, as well as the brief filed by American Federation of Government Employees, AFL-CIO, Local 3151, herein called AFGE, 3/ I find:

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

2. The International Union of Electrical, Radio and Machine Workers, AFL-CIO, and its National Army-Air Technicians Association, Local 676, herein called IUE, seeks an election in the following described unit of employees of the Activity: All excepted Wage Group technicians employed at the 172nd Military Airlift Group, Thompson Field, Jackson, Mississippi, excluding all General Schedule employees, management officials, supervisors, employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees and guards as defined in the Executive Order.

The AFGE seeks an election in the following described unit of employees of the Activity: All technicians of the National Guard employed in accordance with Title 32, United States Code, Section 709, in the Annual Training Equipment Pool, Combined Support Maintenance Shop, Organization Maintenance Shop No. 6, and the United States Property and Fiscal Office at Camp Shelby, Mississippi, excluding all management officials, supervisors, employees engaged in Federal personnel work in other than a purely clerical capacity, guards as defined in Executive Order 11491, Section 2(d), and professional employees.

The Activity asserts that neither unit petitioned for is appropriate, and contends that the only appropriate unit would be one which includes all nonsupervisory technicians employed by the Mississippi National Guard.

The record discloses that overall policy and guidance relating to the civilian personnel administration and the functions of technicians, classified as Federal employees, is set forth under joint Army and Air National Guard Regulations. The Adjutant General of the State of Mississippi administers the technicians' program

1/ The Petitioner's name appears as amended at the initial hearing in this matter.

2/ A/SLMR No. 20.

3/ The Activity's brief was not filed timely and, accordingly, was not considered.

of the Activity on a State-wide basis within these Regulations and guidelines. In this regard, he has the final authority for the assignment, promotion, discipline, or separation of technicians, as well as the authority to establish the basic workweek, prescribe hours of duty and make the final resolution of grievances. The evidence establishes also that the personnel practices and policies of the Activity are initiated and enforced on a centralized basis by its Personnel Officer, who is on the staff of the Adjutant General.

The Mississippi National Guard is comprised of 157 military units situated at 97 locations, with 30 support units situated at 29 locations. The record reveals that the centralization of personnel policies of the Activity results in the fact that all grievances and personnel problems which cannot be resolved locally are referred to the Adjutant General through his staff Personnel Officer for final resolution. Further, it is disclosed that personnel vacancies are posted at all locations throughout the State in both the Air and Army National Guard units, and that all technicians are free to bid on such vacancies. 4/ The evidence establishes that personnel are transferred between units and location, and there is evidence of employees transferring from Army Guard units to Air Guard units. 5/

Case No. 41-1723(RO)

Three units of the 157 military units, operated by the Activity, are air fields located at Gulfport, Meridian and Jackson, Mississippi. At the latter location is Thompson Field, which is the base for the 172nd Military Airlift Group and which includes the employees sought by the IUE. Also at Thompson Field is the headquarters of one of the support units of the Activity, the U.S.

4/ The record reveals that in a few instances bidding on vacancies was restricted to the location of the vacancy due to restrictions on personnel strength at the particular location. However, this is an infrequent occurrence.

5/ The National Guard Regulations provide that a technician must be a member of the military unit in which he is employed as a technician.

Property and Fiscal Office (U.S.P&FO). The unit sought by the IUE would exclude all U.S.P&FO personnel. 6/

With respect to the Air National Guard technicians employed by the 172nd Military Airlift Group, the record reveals that both Wage Board (WB) and General Schedule (GS) technicians are employed. The Wage Board employees generally perform duties associated with "blue collar" employees and the General Schedule employees generally perform "white collar" job functions. However, the evidence further discloses that in many instances the WB and the GS technicians perform related, or in some instances, the same duties and that they interchange without regard to classification. Further, it appears that there have been instances of WB technicians converting to GS status, as well as GS converting to WB status. Also, in at least two instances at Thompson Field, WB technicians supervise GS technicians. Although the IUE, in contending that its claimed unit is appropriate, attached great importance to the fact that generally WB technicians wear fatigue uniforms while GS technicians wear dress uniforms, the record discloses that there are instances where the WB technicians wear dress uniforms and the GS technicians wear fatigue uniforms. The record further discloses that the National Guard Regulations state only that the uniforms worn will conform to the type of work being performed.

While the record does not indicate whether units other than the 172nd Military Airlift Group and the various U.S.P&FO units are located at Thompson Field, it does reveal that the technicians at Thompson Air Field have job contacts with technicians at the Gulfport and Meridian air fields. Thus, the record reveals that technicians are frequently sent on temporary duty to the other air fields to perform work in cooperation with the technicians at the field involved. In addition, there is evidence of transfer of personnel from Thompson Air Base to other fields, and evidence that personnel are transferred from other fields to Thompson Field.

6/ The record reveals that the mission of the U.S.P&FO is to channel military equipment from the U.S. Government to the various units of the Mississippi National Guard, including both Air and Army components. The U.S.P&FO operates a warehouse located at Camp Shelby, and it appears there are also U.S.P&FO units attached to various components of the Mississippi National Guard throughout the State including the 172nd Military Airlift Group. The evidence establishes that at Thompson Field there is some interchange among employees of the U.S.P&FO Headquarters and the U.S.P&FO component attached to the 172nd Military Airlift Group.

Based on the foregoing, I find that the unit sought by the IUE is not appropriate for the purpose of exclusive recognition under Executive Order 11491 as the Wage Board employees in the claimed unit do not share a clear and identifiable community of interest separate and distinct from other employees of the Activity. Thus, the Wage Board technicians sought by the IUE and the excluded General Schedule technicians in many instances perform closely related or the same duties, share common supervision and have common personnel policies, mission and terms and conditions of employment. Moreover, there is evidence of interchange and transfer among the two groups of technicians. In these circumstances, I shall dismiss the petition in Case No. 41-1723(RO).

Case No. 41-1741(RO)

The petition filed by the AFGE is limited to certain support units of the Activity stationed at Camp Shelby. These are identified as the Annual Training Equipment Pool, the Combined Support Maintenance Shop, the Organization Maintenance Shop No. 6, and the U.S.P&FO technicians at that facility. The record reveals also that a subordinate unit, the Field Training Site, apparently is a component of the Organization Maintenance Shop No. 6. As noted above, the mission of the U.S.P&FO is to channel supplies and equipment from the U.S. Government to the various units of the Mississippi National Guard. The record discloses that the mission of the technicians in the other units included in the AFGE's claimed unit is to prepare and maintain equipment utilized in the training operations of various units of the Mississippi National Guard, as well as for units from other States sent to Camp Shelby for training.

The record reveals that all of the technicians sought by the AFGE wear a distinctive grey uniform for the purpose of readily distinguishing them from National Guard personnel sent to Camp Shelby for training. As in the case of all technicians within the State of Mississippi, the technicians in the claimed unit share common personnel policies, wage policies, insurance, sick leave, vacation and retirement policies with the technicians at other locations throughout the State.

While the record is not clear as to the mission of the Field Training Site unit or the Organization Maintenance Shop No. 6, 7/

7/ As to the Field Training Site, the AFGE apparently asserts that all personnel assigned to this unit are either non-technicians or supervisors, and on this basis attempted to amend the unit description so as to exclude this group from the petitioned for unit. However, the Activity disputed the AFGE's assertion that all technicians assigned to the Field Training Site are supervisors. The AFGE also attempted to amend its petition to exclude the technicians in the Maintenance Shop No. 6 at Camp Shelby contending that such employees did not share a community of interest with those included in its petitioned unit. In view of my disposition regarding the AFGE's petition, discussed more fully below, the failure of the Hearing Officer to rule on the AFGE's attempted amendments of its petition herein was not considered to be prejudicial.

it does disclose that the Annual Training Equipment Pool performs first and second echelon maintenance on various types of vehicles, and that the mission of the Combined Support Maintenance Shop is to perform third and fourth echelon maintenance on these same types of vehicles. The record discloses further that the distinction between these services is that the Annual Training Equipment Pool performs the basic regular maintenance, while the Combined Support Maintenance Shop performs major overhaul and repair functions. Because of the similarity of skills involved, there is some interchange of personnel between the two units and, on occasion, employees in the Combined Support Maintenance Shop perform work for the Annual Training Equipment Pool when the latter unit becomes overloaded with work. It further appears that employees of the Combined Support Maintenance Shop are sent regularly on temporary duty to various locations throughout the State to perform third and fourth echelon maintenance work on vehicles and equipment in cooperation with the technicians at those locations. The record further reveals that although technicians of the Annual Training Equipment Pool and Combined Support Maintenance Shop requisition parts and supplies from the U.S.P&FO warehouse at Camp Shelby, such requisitions are made through the supply personnel of each unit rather than by the individual technicians.

Under all the circumstances, I find that the unit sought by the AFGE, whether or not the Field Training Site and/or the Organization Maintenance Shop No. 6 are excluded, is not appropriate for the purpose of exclusive recognition under the Executive Order, as the employees in the claimed unit do not share a clear and identifiable community of interest separate and distinct from other employees of the Activity. Thus, although the technicians in the Annual Training Equipment Pool, the Combined Support Maintenance Shop and the U.S.P&FO Warehouse have some daily relationships with each other, the record reveals these employees enjoy a broader community of interest with other technicians at Camp Shelby as well as with technicians throughout the State. In this latter connection, it is noted that all Mississippi National Guard technicians share the common mission of military preparedness in times of emergency, that the skills and activities of all are organized and interrelated for the accomplishment of this mission; and that they all share a common, overall supervision emanating from the State Adjutant General and his headquarters staff. Also, all technicians are subject to the same regulations governing terms and conditions of employment; personnel practices and policies are equally applicable to all; there are transfers of technicians from one unit to another as well as transfers from one location to another; and there is some degree

of interchange as evidenced by the sending of personnel on temporary duty from one location to another.

Accordingly, because the unit petitioned for by the AFGE is not appropriate for the purpose of exclusive recognition under the Executive Order, I shall dismiss the petition in Case No. 41-1741(RO).

ORDER

IT IS HEREBY ORDERED that the petitions in Case Nos. 41-1723(RO) and 41-1741(RO) be, and they hereby are, dismissed.

Dated, Washington, D.C.
January 13, 1972

W.J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

January 13, 1972

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

UNITED STATES AIR FORCE,
DEPARTMENT OF DEFENSE,
NON-APPROPRIATED FUND ACTIVITIES,
4756TH AIR BASE GROUP,
TYNDALL AIR FORCE BASE, FLORIDA
A/SLMR No. 124

The Petitioner, Local 3240, American Federation of Government Employees, AFL-CIO (AFGE), sought to represent a unit of all regular full-time and regular part-time employees of the Billeting Fund employed by the Non-Appropriated Fund (NAF) Activities of the 4756th Air Base Group, Tyndall Air Force Base, Florida. The Activity contested the appropriateness of the unit sought by the AFGE, contending that Billeting Fund personnel did not possess a clear and identifiable community of interest apart from other NAF employees working in other NAF activities at Tyndall Air Force Base.

The Assistant Secretary found that while the claimed employees had separate immediate supervision, the skills represented in the claimed unit are found in at least six of the other NAF activities on the Base. He also found that all NAF employees are covered by the same Air Force Regulations under which final authority over NAF employees rests in the Base Commander and which provide for uniform personnel policies and procedures, promotion plans, annual and sick leave criteria and the same grievance procedures.

In these circumstances, the Assistant Secretary concluded that the employees in the unit sought by the AFGE did not possess a clear and identifiable community of interest separate and distinct from certain other employees at the Base, and that such a unit would effectuate an artificial division among employees which would result in a fragmented unit and would not promote effective dealings and efficiency of agency operations. Accordingly, he ordered that the petition be dismissed.

A/SLMR No. 124

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES AIR FORCE,
DEPARTMENT OF DEFENSE,
NON-APPROPRIATED FUND ACTIVITIES,
4756TH AIR BASE GROUP,
TYNDALL AIR FORCE BASE, FLORIDA

Activity

and Case No. 42-1495 (RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3240

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer George O. Gonzalez. 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 parties' briefs, the Assistant Secretary finds:

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

2. The Petitioner, American Federation of Government Employees, AFL-CIO, Local 3240, herein called AFGE, seeks an election in a unit of: all regular full-time and regular part-time employees of the Billeting unit employed by the Non-Appropriated Fund activities of the 4756th Air Base Group, Tyndall Air Force Base, Florida, excluding all professional employees, temporary employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors and guards as defined by Executive Order 11491. 1/

1/ The claimed unit appears as amended at the hearing.

The Activity disputes the appropriateness of the claimed unit contending that the appropriate unit herein would be one consisting of all nonsupervisory and nonmanagerial employees of all of the Non-Appropriated Fund activities at Tyndall Air Force Base.

The employees in the unit sought by the AFGE are employed by the Billeting Fund, which is one of ten Non-Appropriated Fund (NAF) activities at Tyndall Air Force Base. The other NAF activities are the Central Base Fund, the Aero Club, the Central Accounting Office, the Noncommissioned Officers' Club, the Officers' Club, the Nursery, the Pre-Kindergarten, the Saddle Club and the Yacht Club. There are approximately 258 employees in all of the NAF activities, with some 40 of them being employed within the claimed unit. The majority of the employees in the claimed unit are maids and janitors. The mission of the NAF activities is to provide facilities which contribute to the morale, welfare and recreation of the military personnel of the United States Air Force. The membership in the Billeting Fund is composed of the occupants of the Bachelor Officers' Quarters, the Bachelor Noncommissioned Officers' Quarters and the Guest House at Tyndall Air Force Base, all of whom pay a set periodic fee primarily for maid and janitor services. Personnel policies and procedures with regard to NAF's related activities are governed by regulations and directives issued by the United States Air Force and the Department of Defense. Also, at Tyndall Air Force Base, a Fiscal Control Office has been established to provide NAF activities on the Base with centralized professional bookkeeping and accounting services and separate general ledger control accounting in order to minimize opportunities for misappropriation and unauthorized use of assets.

The record indicates that each NAF activity at Tyndall Air Force Base, including the Billeting Fund, is headed by a Custodian who is appointed by the Base Commander. The Custodian is the supervisor who has the day-to-day supervision over employees within each particular program. Immediately below the Custodian in the chain of supervision in the Billeting Fund is the Foreman whose duties include checking on the performance of the Janitor Leaders in the unit. 2/ The Foreman is responsible for checking and correcting any problems which might arise with respect to the cleanliness of the facilities receiving maid and janitorial service. He works through the lowest level in the chain of supervision, the Janitor Leader, a working member of the unit, who carries out the Foreman's directions to the staff.

2/ Although the record does not go into detail with respect to the duties of the Foreman and the six Janitor Leaders in the requested unit, the Activity apparently takes the position that they, as well as the Office Manager, about whom no testimony was elicited, are supervisors. In view of my ultimate conclusion in this case, I find it unnecessary to make a determination as to their eligibility.

The evidence demonstrates that the employees in the claimed unit perform varied duties at the Bachelor Officers' Quarters, the Bachelor Noncommissioned Officers' Quarters, and the Guest House at Tyndall Air Force Base. These duties include cleaning individual rooms, making the beds and dusting, sweeping and mopping porches and day rooms, cleaning the latrines, obtaining the necessary supplies and laundry and maintenance of the grounds. The record reveals further that most of the jobs represented in the various NAF activities throughout the Base are of the unskilled variety, and it would appear the employees in the unit sought could be interchanged readily with other NAF employees of the Base. In this regard, the record indicates that transfers from the Billeting NAF to other Base NAF activities have occurred in the past.

The record reveals that all NAF employees at the Tyndall Air Force Base are governed by the same Air Force Regulations which provide for uniform personnel policies and procedures, promotion plans, annual and sick leave criteria, a standard wage system, and the same grievance procedures. Final authority over all employees in the various NAF activities rests with the Base Commander. Moreover, as noted above, there are centralized bookkeeping and accounting services for all the NAF activities. The record further reveals that the skills represented in the claimed unit are present in at least six of the other NAF activities on the Base and that all NAF employees on the Base in the same classifications as the employees in the claimed unit work daylight hours, wear the same type of clothes while working, take coffee breaks, lunches and other breaks at similar times and under centrally prescribed rules.

Based on the foregoing and noting particularly the fact that there are employees on the Base, in addition to those sought by the AFGE, who perform essentially the same job functions as those in the claimed unit, and that all NAF employees herein are covered by uniform promotion procedures, grievance procedures, sick and annual leave, pay scales, working conditions, requirements for promotion, standards for working conditions, and job performance requirements, I find that the claimed unit is not appropriate for the purpose of exclusive recognition under Executive Order 11491. Moreover, in my view, to separate the Billeting unit NAF employees from other NAF employees employed at the Base who have similar terms and conditions of employment and who generally perform their job functions in the same work area, and who share uniform employment conditions and benefits, would effectuate an artificial division among employees and would result in a fragmented unit which would not promote effective dealings or efficiency of agency operations. Accordingly, I shall order that the AFGE's petition be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 42-1495 (RO) be, and it hereby is, dismissed.

Dated, Washington, D. C.
January 13, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

January 24, 1972

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

NASA MANAGEMENT AUDIT OFFICE
A/SLMR No. 125

This case involves a Regional Administrator's dismissal, affirmed by the Assistant Secretary, of a representation petition filed by American Federation of Government Employees, Local 2842, AFL-CIO, (AFGE), after the Agency head had made a determination that the unit sought was covered by Section 3(b)(4) of the Order in that the Order could not be applied to the claimed employees in a manner consistent with the internal security of the Agency. The Federal Labor Relations Council (Council), after granting a petition for review filed by the AFGE, remanded the case to the Assistant Secretary stating that "a dispute over the findings by any agency head that a unit sought to be represented by a union has a 'primary function' related to internal security is subject to review by the Assistant Secretary, as provided in the Order, to determine whether such findings were arbitrary or capricious." Thereafter, pursuant to the remand, a hearing was held before a Hearing Examiner.

In his Report and Recommendations, the Hearing Examiner found that in the circumstances, the evidence did not establish that the determination of the Agency head was arbitrary or capricious. Accordingly, he recommended that the dismissal of the representation petition be sustained. In his Decision and Order, the Assistant Secretary adopted the findings, conclusions, and recommendations of the Hearing Examiner and ordered that the representation petition filed by the AFGE be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NASA MANAGEMENT AUDIT OFFICE

Activity 1/

and Case No. 46-1848(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2842, AFL-CIO

Petitioner

DECISION AND ORDER

On August 21, 1970, the Regional Administrator dismissed the representation petition in the above-named case filed by American Federation of Government Employees, Local 2842, AFL-CIO, herein called AFGE. In his dismissal, the Regional Administrator ruled that the determination of the Administrator of the National Aeronautics and Space Administration, herein called NASA, that the unit requested came within the meaning of Section 3(b)(4) of the Order in that the Order could not be applied to the claimed employees in a manner consistent with the internal security of the Agency, rendered further proceedings on the AFGE's petition unwarranted. On November 2, 1970, the Assistant Secretary issued his decision denying the AFGE's request for review of the Regional Administrator's action and stating that a determination by an Agency head under Section 3(b)(4) was not subject to review by the Assistant Secretary. Thereafter, the AFGE filed a petition for review of the Assistant Secretary's decision with the Federal Labor Relations Council, herein called the Council. On January 4, 1971, the Council granted the AFGE's petition for review, and thereafter on April 29, 1971, issued its Decision on Appeal (FLRC No. 70A-7) remanding the proceedings to the Assistant Secretary for appropriate action consistent with its decision. In its Decision on Appeal, the Council held that a dispute over the findings of an Agency head "that a unit sought to be represented by a union has a 'primary function' related to internal security is subject to review by the Assistant Secretary, as provided in the Order, to determine whether such findings were arbitrary or capricious."

1/ The parties are in agreement that the name of the Activity was changed on April 16, 1971, from National Aeronautics and Space Administration, Audit Division (Code DU) to the name set forth above.

In accordance with the Council's decision, the Assistant Secretary remanded the above-named case to the appropriate Regional Administrator for the issuance of a notice of hearing. Thereafter a hearing was held before Hearing Examiner Frank H. Itkin on July 20 and 21, 1971.

On November 11, 1971, the Hearing Examiner issued his Report and Recommendations in the above-entitled proceedings finding that, in the circumstances, the action of the Administrator of NASA "in determining that a primary function of the Audit Division is the audit of work of officials or employees for the purpose of ensuring honesty and integrity in the discharge of their official duties and that the Executive Order cannot be applied to the requested unit in a manner consistent with the internal security of NASA" was not arbitrary or capricious. Accordingly, he recommended that the dismissal of the representation petition in the subject case be sustained. Therefter, the AFGE filed a request for review of the Hearing Examiner's Report and Recommendations with the Assistant Secretary, and the Activity filed an answer to the request for review.

The Assistant Secretary has reviewed the rulings of the Hearing Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Hearing Examiner's Report and Recommendations and the entire record in the case, including the request for review filed by the AFGE and the answer thereto filed by the Activity, I hereby adopt the findings, conclusions, and recommendations of the Hearing Examiner.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 46-1848(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
January 24, 1972

W.J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

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

NATIONAL AERONAUTICS & SPACE
ADMINISTRATION, AUDIT DIVISION
(CODE DU),

Activity

CASE NO. 46-1848(RO)

And

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES LOCAL 2842 (AFL-CIO),

Petitioner

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Activity.

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Before: Frank H. Itkin, Hearing Examiner

REPORT AND RECOMMENDATIONS

Statement of the Case

This proceeding arises under Executive Order 11491. On June 25, 1970, the American Federation of Government Employees Local 2842, AFL-CIO (herein, "the Union"), filed a representation petition with the Assistant Secretary for Labor-Management Relations pursuant to the Executive Order, seeking to represent a unit of "all non-supervisory GS employees, including professionals," in the Audit Division of the National Aeronautics & Space Administration, Washington, D. C.,

(herein, "NASA"). On July 23, 1970, the NASA Administrator, Dr. T. D. Paine, determined "that the unit requested falls within the meaning of" Section 3(b)(4) of the Executive Order "and that the petition is hereby denied on the grounds that the Order cannot be applied in a manner consistent with the internal security of the agency." 1/ Thereafter, the regional administrator for the Assistant Secretary dismissed the Union's representation petition, ruling that the agency head's determination rendered further proceedings unwarranted. On November 2, 1970, the Assistant Secretary upheld the action of the regional administrator on the grounds that the determination made by the NASA Administrator rests in the sole judgment of the agency head and "is not subject to review by the Assistant Secretary;" consequently, "an investigation into the merits of the NASA Administrator's determination * * * does not appear to be appropriate."

On January 4, 1971, the Federal Labor Relations Council granted the Union's petition for review of the Assistant Secretary's decision, "limited to the following major policy issue: Whether the Assistant Secretary has authority to review that portion of the NASA Administrator's determination under Section 3(b)(4) which found that the Audit Division 'has as a primary function investigation or audit of the conduct or work of officials or employees of the agency for the purpose of ensuring honesty and integrity in the discharge of their official duties.'" On April 29, 1971, the Council issued its decision on appeal, remanding these proceedings to the Assistant Secretary for appropriate action consistent with its decision. The Council held, in pertinent part as follows:

* * *

> The exclusion of a segment of an agency from the operation of the Order obviously limits effective collective bargaining within the agency, and deprives the employees concerned of the opportunity to participate in the formulation and implementation of personnel policies and practices, sought to be extended by E.O. 11491. Although the need for such an exclusion is recognized under the limited conditions prescribed in Section 3(b)(4), that section was plainly not intended to empower an agency head, under the guise of 'internal security' findings, to exclude any office, bureau or entity of his agency from the impact of the Order. Any such interpretation would enable an agency head, arbitrarily or capriciously, to defeat the underlying purposes of the Order.
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> * * * [T]he Order assigns to the Assistant Secretary the initial responsibility to resolve controversies over representation matters. In our opinion, it is implicit, under Section 3(b)(4), that a dispute over the findings by an agency head that a unit sought to be represented by a union has a 'primary function' related to internal security is subject to review by the Assistant Secretary, as provided in the Order, to determine whether such findings were arbitrary or capricious. The burden of proof before the Assistant Secretary is, of course, on the union which claims that the action of the agency head was arbitrary or capricious. Furthermore, the decision of the Assistant Secretary is subject to appeal to the Council as provided in the Council's rules of procedure. (35 Fed. Reg. 15065).

On May 20, 1971, the Assistant Secretary further remanded this case to the regional administrator "for the issuance of a notice of hearing" designating that "a hearing examiner take evidence consistent with the Council's decision on appeal and make factual findings and recommendations. Thereafter, the hearing examiner shall report these findings and recommendations to the Assistant Secretary and the parties * * *." 2/ On June 3, 1971, the regional administrator issued a notice of hearing. Subsequently, on July 14, 1971, the Assistant Secretary granted NASA's "request for a closed hearing" in this case and also directed that a pre-hearing conference be held "for the purpose of establishing the procedural guidelines to be followed" during the hearing.

As directed, a pre-hearing conference was conducted before me on July 20, 1971. Following the conference, a closed hearing was held before me on July 20 and 21, 1971. All parties were represented

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1/ Section 3(b)(4) provides:

> * * * This Order (except Section 22) does not apply to * * * any office, bureau or entity within an agency which has as a primary function investigation or audit of the conduct or work of officials or employees of the agency for the purpose of ensuring honesty and integrity in the discharge of their official duties, when the head of the agency determines, in his sole judgment, that the Order cannot be applied in a manner consistent with the internal security of the agency.

2/ The Assistant Secretary, in remanding the case, also noted:

> Provision should be made that any party aggrieved by the findings and recommendations of the hearing examiner may obtain a review of such action by the Assistant Secretary by following the procedure set forth in Section 202.20(f) of the regulations * * *.

by counsel, who were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, submit oral argument, and file briefs. Upon the entire record in this matter, from my observation of the witnesses, and after due consideration of the briefs filed by the parties, I make the following findings and recommendations:

I. The contentions of the parties.

The Union argues on remand that the determination of the NASA Administrator -- "that the unit requested falls within the meaning of" Section 3(b)(4) of the Executive Order "and that the petition is * * * denied on the grounds that the Order cannot be applied in a manner consistent with the internal security of the agency"-- was made in an arbitrary and capricious manner. "The basis of this position," the Union states, "is that the Audit Division does not perform as a primary function the work described in Section 3(b)(4) of" the Executive Order. The Union asserts:

> * * * The NASA Audit unit does have as a primary function the examination of NASA activities to determine if they are being carried out in an economical and efficient manner, * * * [However,] the work described in Section 3(b)(4) of the Order is performed as a primary function by the Inspections Division of NASA.
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> * * *

NASA argues: "The determination of the Administrator to exclude the employees of the NASA Management Audit Office [Audit Division] from coverage of Executive Order 11491 under Section 3(b)(4) authority is supported by the facts. The testimony and documentary evidence presented at the hearing demonstrate that the audit office has as a primary function audit of the work of officials and employees of NASA for the purpose of ensuring honesty and integrity in the performance of their official duties. Further, * * * the audit office is an integral part of the internal security system of NASA. The * * * union has not carried its burden of proof. The Administrator's determination cannot be said to be arbitrary or capricious."

II. In general; the NASA Audit Division and its relationship to other NASA operations. 3/

The NASA Audit Division, according to the written instructions promulgated by the Activity (see Exhibits P-9, N-1, and N-2), "is primarily concerned with advising and assisting NASA management officials at headquarters and field installations in achieving performance of their missions in an effective and efficient manner." 4/ The Audit Division (now called "Management Audit Office," see n. 4 supra) is organized into regional audit offices, the heads of which report to the Director, Martin Sacks. There are some 76 persons who report to Director Sacks; Sacks in turn reports to the Associate Administrator for the Office of Organization and Management. Director Sacks is responsible for, inter alia, conducting or arranging for the performance of independent reviews and appraisals to "[a]scertain that financial and business management operations are in compliance with NASA policies, procedures, and Government laws and regulations;" to "[e]stablish the effectiveness with which resources of manpower, property and funds are utilized in NASA and in contractor operations;" to "[d]etermine the effectiveness of safeguards provided over NASA's assets;" and to "[f]ollow-up periodically on actions taken by NASA, DCAH, and other Government audit agency recommendations * * *." Director Sacks is also responsible for "[r]eporting audit findings with recommendations for corrective action to management officials directly concerned" and referring audit reports directly to the head of the organization under audit, to officials of other NASA organizations "whenever they have the authority or responsibility for actions related to audit findings and recommendations," and to the NASA Administrator or Deputy Administrator when requested or necessary.

In addition, NASA has an Inspections Division (see Exhibit N-3). The Director of the Inspections Division, Ralph Winte, also reports to the Associate Administrator for the Office of Organization and Management. Director Winte has some 13 persons working under his direction. His responsibilities include, inter alia, "investigations to detect unlawful or unethical conduct on the part of NASA employees;" "investigations to detect fraud or other illegal activity by contractors or others which affects NASA;" and "inspections for the purpose of disclosing conditions which might lead to violations of laws and regulations by NASA employees, contractors and others which affect NASA."

3/ The evidence summarized in this and following sections of the Report is based upon the essentially uncontradicted testimony of the witnesses and written documents adduced by the parties.

4/ Exhibit P-9 is the promulgated management instruction effective on January 24, 1968. Exhibit N-1 is the management instruction effective on December 3, 1970, cancelling P-9. Exhibit N-2 is the management instruction effective on April 16, 1971, cancelling N-1. In brief, Exhibit N-1 deleted paragraphs 4(g) and 4(h) from Exhibit P-9. Exhibit N-2 changed the name of the Audit Division to the NASA Management Audit Office. The parties acknowledge that these changes have had no substantial effect on the role and functions of the Audit Division as set forth in Exhibit P-9, which was operative when the Union's representation petition was filed.

NASA also has a Security Division (see Exhibits N-4 and N-5), headed up by a Director of Security. The objective of this division is to "[s]afeguard the property and facilities of NASA and information in the custody of NASA, which has been assigned a security classification in the interests of national defense or national security." The Director of Security has some 16 persons working under his direction; he ordinarily reports to the Director of Headquarters Administration.

Bernard Mortz, Deputy Associate Administrator of the Office of Organization and Management, 5/ testified that the Audit Division, the Inspections Division and the Security Division collectively "have a primary responsibility with respect to internal security" at NASA. As Moritz explained, "the Inspections Division is responsible for assuring that there is adherence to standards of conduct which the agency believes to be appropriate for employees. It does investigate the activities of individuals * * * who have been reported in one way or another as possibly infringing upon the standards that have been established. The Security Division is concerned with the safeguarding of property and facilities. It is also concerned with the safeguarding of classified information. The Audit Division is charged, as are the other two, with the conduct of inspections, investigations by security people and by inspections people, and audits to determine whether or not there has been compliance with laws and regulations. The Audit Division is also charged with responsibility for conducting reviews and appraisals to determine whether there has been compliance on the part of NASA personnel with the standards of work performance that are to be expected."

Moritz further testified:

> * * * In any audit which is conducted, there is a possibility that there will be identified individuals who have not complied with established policies, procedures, regulations and laws * * *. [For example,] Procurement policies and laws, personnel provisions, standards of conduct, * * * financial arrangements and transactions * * * [and] falsification or lack of it in documenting financial transactions of the organization * * *.

Moritz acknowledged that "[n]o audit * * * is initiated for the purpose of identifying people who have committed errors, but at the same time we are aware in having an Audit Division function at all that this is always a possibility, and it is why we have audits, as a protective measure for the agency, to guard against the errors of which humans are capable." Moritz noted:

> * * * The Audit Division does not get into the matter of the detailed investigation of people's conduct. The Audit Division, however, in the course of its audit may surface the fact that individuals have done certain things which ought to be examined in detail by an investigative body. * * *

Ralph Winte, Director of the Inspections Division, testified that his division "is and always has been small" in number and, consequently, "on a number of occasions * * * would use the people for the Security Division to investigate," for example, "thefts of government property." Winte, in addition, would "get the assistance of auditors." Winte recalled two situations within the last year requiring the services of a total of three unit auditors, noting "[t]hat one [such procedure] is going on right now." Winte added, the "relationship" between inspectors and auditors "is very informal. We have a very close relationship with the inspector and the auditor."

In addition, Winte explained that his division "would get information from the audit reports. An auditor who discovers a false billing or these kinds of matters would talk to the inspector at the center level." In this manner, during the past year, Winte received some five or six cases from the Audit Division. In sum, Winte testified:

> The liaison is very close with the Audit Division, both at headquarters and the centers. Our people know each other very well and talk frequently. * * * The same thing occurs here in headquarters. [Audit Division Director] Sacks and I see each other at least twice a week at staff meetings, and then we talk on the phone. If I have a matter that I think should be explored further by the Audit Division, I say * * * maybe you ought to take a look at the procedures and see whether the procedures and responsibilities of the center management, whether they are doing it properly. And then, he will take this into consideration and make an audit of this particular center.

Winte further noted that "his relationship with the Security Division is similar to [his] relationship to the Audit Division." 6/

5/ At the time the Union filed its representation petition, Moritz was the Acting Associate Administrator for NASA.

6/ Director Sacks, whose testimony is discussed at length infra, also testified that the Audit and Investigations Divisions "carry on a continuing exchange of information* * *." Winte is given a copy of each audit report.

The relationship between the Audit Division and Inspections Division was further delineated in an amendment to the NASA Audit Manual, which was distributed by Director Sacks to all Audit managers on March 4, 1962. That document recites, as follows:

* * *

RELATIONSHIPS WITH NASA INSPECTIONS OFFICE

> The NASA Inspections Office is responsible for (1) matters relating to NASA standards of conduct, conflicts of interest, outside employment and financial interest of NASA employees and the conduct of NASA employees in the performance of official duties, and (2) the detection of fraud, violations of law and regulations by NASA and contractor employees.
>
> The auditor should be alert to conditions that indicate fraud, illegal acts or conflicts of interest. If noted, these conditions should be reported immediately, through the regional audit manager, to the Headquarters Office of the Audit Division. These conditions should not be discussed with Center or contractor personnel. Although the auditor may be requested to provide factual data for use by the Inspections Division, it is not the responsibility of the Audit Division to investigate or confirm the existance of fraud, illegal acts or conflicts of interest on the part of center or contractor employees.

Director Sacks explained: "The purpose of this document [quoted above] is to delineate the responsibilities of the NASA Audit Office and the NASA Inspections Office. It is also the purpose to alert auditors not to pursue * * * the confirmation of certain suspicions which may arise * * * which fall properly within the purview of the Inspections Division."

III. The work performed by the NASA Audit Division employees.

Audit Division Director Sacks testified at length with respect to the nature of the work performed by his unit employees. Sacks explained that there "are two major aspects of * * * a typical NASA audit. One, determination that the prescribed procedures, principles, regulations and standards adopted by NASA management are soundly conceived. * * * [I.e., a] review of the principles themselves, the regulations themselves, the procedures themselves, to determine in light of the assigned responsibilities of a particular organizational element that they appear to be adequate in concept for accomplishing

their intended purpose." As for the second major aspect of a typical audit, Sacks continued:

> Now, of equal, if not greater, importance is the review to determine that those prescribed procedures and policies are being appropriately, effectively and efficiently carried out by the assigned individuals who are responsible for the function

Director Sacks further testified: "* * * [W]e are responsible for the reviews of NASA Civil Service employees, approximately 30,000 or 29,000 in number * * *." Sacks' office conducts "an audit of [a] transaction for the purpose of assuring that the procedures, that the concepts established by NASA, are being complied with, but in reaching that objective * * *, [the Audit Division reviews] the activities of specific individuals." Sacks contrasted the work of his office with the work of Ralph Winte, Director of the Inspections Division, as follows:

> * * * Ralph Winte performs a review to determine whether fraud is committed. I perform a review to assure that the prescribed procedures, policies and so forth are properly complied with. However, to do that, we in effect both review the activities of individuals. 7/

In sum, the Audit Division, as Sacks testified, principally reviews the activities of the 29,000 to 30,000 NASA employees "who perform procurement functions, * * * property functions, * * * budgetary functions, financial [or] accounting functions, payroll functions * * *" and related duties. The Audit Division attempts "to cover every activity in NASA on a reasonably cyclic basis, so that management will receive adequate assurances that the operations are being conducted properly * * *." In this manner, Sacks' office reviews "all business management activities [at NASA], procurement, financial management, property supply management, construction of facilities, financial or

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7/ Sacks also stated: Winte's "objective is different. My objective is to help management assure that operations are being efficiently, economically, most effectively and appropriately being carried out. But in reaching that objective or to secure that assurance, we review and [Winte] investigates the activities of specific individuals. Consequently, [Winte] will be exploring fraud. I may come upon fraud, which I will immediately report to [Winte], or a conflict of interest or an absolute violation of the Act. But this is a possible consequence of any audit in which we are involved. * * *." (Emphasis added.)

payroll and accounting activities, all of that which works together to comprise the NASA organization, as well as the technical and program side to the extent that they are involved in administrative operations."

Thus, for example, Sacks stated: "at one of our major centers, the in-house activities comprise eight major laboratories. Each laboratory director operates in effect as an installation director. * * * [Sacks' Audit Division will review,] does he [the laboratory director] have sufficient controls to assure these people aren't taking home colored TV sets or oscilloscopes or whatever. In examining these controls, [the Audit Division is] examining what his [the laboratory director's] people do and, unfortunately, from time to time will find unauthorized use of property * * *." Sacks continued: "we are auditing to see [that the director] is using the funds in the best interest of the taxpayer. That brings in efficiency, appropriateness, legality * * *." 8/

Further, Sacks explained that when performing an audit, his office is in fact concerned "with the honesty and the integrity of the employees who are carrying out the process or procedures of an activity." For, according to Sacks, "honesty and integrity" means "anything which represents inappropriate action, which would reflect unfavorably on the reputation, image and well-standing of the agency, as well as result in inefficient and ineffective and inappropriate use of Agency assets." Moreover, although the auditors do not name the employees involved in their various reports, "the recipients of audit reports know specifically the individuals within their respective organizations to whom responsibilities have been entrusted."

A. The job-descriptions of Audit Division personnel.

The job-descriptions of various personnel in the NASA Audit Division generally substantiate the testimony of Deputy Associate Administrator Moritz and Director Sacks as summarized above. Thus,

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8/ Sacks acknowledged: "We don't go about initiating an audit * * * to discover fraud. This isn't the purpose of an audit * * *. If improper conduct and all the other weaknesses and deficiencies which generally crop up on a daily basis in an organization of our size are uncovered, these are cited * * * as a frame of reference to recommend strengthened controls on a broader basis. * * * [W]e do this by citing the particular illustrations of what the particular responsible elements have been doing."

the description for a "GS 15 Supervisory Auditor" (see Exhibit P-11) provides, inter alia, as follows:

* * *

Is responsible for managing, directing, programming, and supervising independent reviews, appraisals, and reporting of NASA and Manned Spacecraft Center complex programs and contractors located throughout the seven states which comprise the audit region, involving independent investigation into the development, implementation, and supervision of research and development plans, programs, objectives, funds, manpower utilization, and the attendant management of staff operations. Includes the establishment of criteria and objectives for use by DOD audit agencies providing services for NASA. Works with latitude under the technical guidance and direction of the Director, NASA Headquarters Audit Division, who reviews results of audit operations for accomplishment of audit mission. More specifically, performs the following:

1. Plans and manages the activities of a group of auditors (GS-14, GS-13, and GS-12) conducting reviews to determine that all internal financial controls within the Manned Spacecraft Center and contractors in the Audit Region are operating with consistent efficiency and effectiveness and promoting standard accounting practices that have been adopted by the Director of Audits. * * *.

2. Plans and supervises the primary phases of program and mission objectives which include examination of financial transactions for compliance with policies, procedures, laws, and regulations; evaluation of reliability and appraisal of management utility of budgetary, accounting, and other financial and statistical data; appraising the effectiveness with which resources (manpower, property, and funds) are utilized; analysis or findings and preparation of audit reports; furnishing advice and assistance to Manned Spacecraft Center officials on all aspects of audits; etc. Observes and comments on operating practices which influence financial management. Prepares recommendations for changes in methods and procedures on the basis of evaluation and observation.

* * *

The description for a "GS 12 Auditor" (see Exhibit P-12) provides, inter alia, as follows:

E. MAJOR RESPONSIBILITIES

1. Reviews and evaluates accounting systems and management controls to determine the scope of the audit which will be required to ascertain the reliability and propriety of statements and records. Determines the degree of compliance with directives, policies, instructions, and/or generally accepted accounting principles and practices. Recommends changes considered necessary to aid in effective management and to correct any weaknesses or practices which may adversely affect the interests of the agency. Based upon the survey of the accounting system and evaluation of the system of internal controls, prepares or modifies audit programs which will fix the scope of the audit required to ascertain the reliability and propriety of the statements and finanacial records or other management data. Applies appropriate audit procedures on a selective basis to the extent necessary to supply audit recommendations . Appropriate audit procedures may include examination of basic documents upon which management decisions are based or from which accounting records areprepared to determine that such documents adequately support the resulting data or accounting entries; ascertaining that all transactions have been recorded and adequately supported; test checking the accuracy of computations such as accruals and allocations; analyzing accounts, statements, or transactions to detect unusual items or significant trends; test checking inventory counts to verify the accuracy of recorded quantities; and analysis and evaluation of forecasts in light of known or foreseeable factors. Prepares audit work papers showing the nature and extent of audit work performed to adequately support opinions reached as a result of such audit work. Prepares audit reports showing findings of the audit and recommendations. Participates in conferences with DOD, NASA, industry, and other Federal and non-Federal representatives to resolve problems disclosed by audit, and to furnish recommendations or advice concerning the financial and other related aspects of management. Interprets procedures, policies, and requirements related to the audit operation. Prepares statistical and other reports reflecting the result of audit operations. Composes and reviews a wide variety of correspondence pertaining to the work. * * *

And see, Exhibit P-13 for the "GS 11 Auditor;" Exhibit P-14 for the "GS 9 Auditor;" and Exhibit P-15 for the "GS 6 Secretary." 9/

B. Examples of a program and audits performed by Audit Division personnel.

Exhibit N-7 contains an audit program for "Stores Stock Supply Management." The purpose of this program "is to provide uniform guidance during scheduled in-house audits of stores stock supply management." The program states, inter alia, as follows:

* * *

A5. During the audit be alert for the existence of unrecorded inventories, and determine whether the installation has given appropriate emphasis in its internal procedures to the requirement that all such materials, with certain exceptions, be placed under continuing physical and finanacial controls. * * * Be particularly alert for unrecorded scrap, excess and surplus materials . [p.5]

6. Determine the adequacy of security over material in storage and in possession of various work shops. * * * Determine whether highly pilferable materials and other items of a special nature * * * are kept under lock and key. Be alert for instances of apparent but non-existent security. * * * [p.5]

C3b. * * * review and appraise installation procedures and controls to fix responsibility for shortages between quantities of material shown as shipped on shipping documents and quantities actually received. * * * Be particularly alert for repetitive shortages of pilferable [or] sensitive material * * *. [p.8]

* * *

D1a. Select a representative number of filled requisitions * * * determine whether such individuals were authorized to receive material * * *.

D1b. * * * Be particularly alert for filled requisitions that are incomplete, vague, or there is some questions as to the intended use of the items * * *. Be alert for extensive conditions wherein the priority system is being abused * * *. [p.11]

9/ Exhibit P-11, unlike the other job-descriptions, concerns a supervisory position assertedly not within the requested unit.

D5. Review and evaluate the installation's survey procedures to determine whether existing controls appear satisfactory to identify the cause of the loss, fix responsibility, and to initiate action to prevent reoccurrence wherever possible * * *. [p.12]

* * *

E 2b and 2c. * * * Be particularly alert for personnel assigned as inventory takers who are also responsible for record keeping and storage * * *. Scan count sheets and tags for evidence of improper alteration, erasures, or other manipulations to obscure shortages. [p. 15]

* * *

F 4c. * * * be alert for practices that result in requesting excess material even though a valid need does not exist * * *. [p. 19]

* * *

G2a. * * * Select a representative number of such shipments * * *. Investigate the cause of any discrepancies, and determine whether additional and/or more refined controls are needed to safeguard the material. Be particularly alert for pilferable type items * * *. [p. 23]

Exhibits N-8 through N-15 were offered by counsel for NASA and received into evidence "as some examples of sensitive audit reports which bear on the internal security of NASA." 10/ For example, Exhibit N-8 concerns an audit pertaining to the financial and funding aspects of a construction program. This report discloses, inter alia, that "several projects approved and in progress at the time of [the] audit * * * would exceed the $250,000 limitation [set by statute] if they were carried through according to preliminary plans. In addition, [the audit discloses] one instance where the prescribed limit has actually been exceeded when the costs of the collateral equipment and improvements are considered in the total costs."

10/ At the request of counsel for NASA, Exhibits N-8 through N-15 will not be made a part of the formal record because they assertedly contain sensitive information. They are being transmitted by me directly to the Assistant Secretary.

Exhibit N-9 concerns an audit of certain in-house engineering support activities. This audit

> * * * disclosed that although the terms and conditions of [the contract] and the related task orders restricted the contractor to [certain] work, [the contractor] had performed in-house engineering support services, totalling at least $187,710 in a number of other areas. * * * Details of the unauthorized programs involved * * * are summarized in the attached Exhibit and supporting schedules.

Exhibit N-10 concerns an audit of administrative and other aircraft operations. That report reveals, inter alia:

> * * * there were no documented explanations or other supporting back-up material in the transportation files. As a result, determinations could not be made as to whether the administrative airplanes were used for the purposes intended.
>
> Without adequate documentation and support to indicate otherwise, a number of the flights appeared questionable, when considering such factors as the dates, destinations, arrival and departure hours, sketchy stated purposes, available commerical services, etc.

Examples are cited in the report.

Exhibit N-11 pertains to an audit of financial and administrative aspects of a particular event attending a lunar landing. This audit "was motivated by a * * * review of shortages in" certain accounts. Involved were, inter alia, discrepancies in financial reports; deviations from accepted business practices including "preparation of purchase orders after-the-fact" and "residual items not being properly accounted for;" and a cash advance issued to an individual without proper controls.

Exhibit N-12 concerns an audit of travel controls and practices. The report reveals:

> A significant number of vouchers covering travel actions appeared to be at variance with what a prudent businessman would authorize.
>
> * * *
>
> Our review of employee TDY travel controls disclosed a significant number of vouchers covering travel actions that appear to be at substantial variance with what a prudent businessman would authorize.

Examples are cited in the report. The document also notes:

> * * * the large number of vouchers that show a significant quantity of annual leave relative to the time spent on the "official" part of the trip, together with the results of our follow-up on specific trips and to general looseness over travel, leads us to believe that [deleted] management's permissiveness in this area has led to a practice that results in ineffective use of its travel funds.

Exhibit N-13 pertains to an audit of the NASA Executive Lunch Room. The document discloses that the auditors

> * * * were unable to perform an adequate cash count because the lunch room funds were commingled with the chef's personal funds.
>
> * * *
>
> [The auditors] also noted that the cash register tapes supporting food purchases were altered by crossing out personal purchases.
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> * * *

Exhibit N-14 pertains to an audit of the imprest fund. It discloses that "Cash is obtained from the imprest fund by the Employee Development Branch and delivered to a specific employee in the organization requesting the lecture who, in turn, makes the actual payment to the lecturer." The Audit Division recommended that the center employee "actually making the payment to the lecturer" sign an appropriate verification form.

Exhibit N-15 concerns property passes. The report "noted that an oscilloscope was at the home of an employee for personal purposes. It had been removed from the Center without use of a property pass. The Branch Head informed [the auditor] that although he had given verbal approval of the loan of the equipment, he was unaware of its intended unofficial use."

Sacks explained that "very few" of the reports issued by his office within a fiscal year "contain comments which point up acts of dishonesty," because "most employees perform their duties in an honest upright fashion * * *." Annually, the Audit Division prepares well over 50 reports concerning in-house civil service activities similar to those discussed above. The preparation of such reports consumes a substantial proportion of unit employee work-time (see Exhibits N-16 and N-17).

C. The testimony of Francis Alexander concerning his duties in the Audit Division.

Francis Alexander, called by the Union as its witness, was employed by NASA in the Audit Division from January 1965 to August 1969. 11/ Alexander's job in the Audit Division principally involved the preparation of monthly reports on the status of audit recommendations. Alexander prepared no audits himself. The particular job performed by Alexander in the Audit Division has since been eliminated.

In preparing his reports, Alexander would summarize each audit, its findings and recommendations, and what action had been taken. Alexander, on the basis of his experiences, summarized an in-house audit as follows:

> * * * You usually go into a particular function or program with a view to determining whether or not the particular program is being carried out by * * * people * * * to see if the work being done is in accordance with the mandate of Congress or the Agency or the rules and regulations that have prescribed and authorized [the particular program].

In Alexander's view, "the primary function of the audit * * * [is] to determine the efficiency of the operation for management."

Alexander testified that the NASA Inspections Division was charged with the responsibility of discovering fraud; and that he had written instructions "to refer any cases that we came across that involved the integrity or dishonesty of any individual to the Inspections Division." Alexander continued:

> We submitted anything that we might have picked up in the audit that would even indicate there was fraud or dishonesty or someone doing something they shouldn't have done, such as falsification of records, making claims that weren't proper, anything like that.

Alexander also noted that he would not "come across instances of this frequently in [his] experience." He added: "Occasionally, you would run across, well primarily it would be involving something like a travel

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11/ The Union's representation petition in this case was filed in June 1970, some 10 months after Alexander left the Audit Division.

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voucher or misuse of imprest money or something like that." 12/ However, Alexander never recalled seeing any audit programs that were "primarily" concerned with investigating the fraud or dishonesty of any NASA employees or NASA contract employees. 13/

When asked what he would say was the "primary function" of the Audit Division, Alexander answered:

> * * * in my opinion the primary purpose of that audit or any other audit is to determine how well the operation is being carried out, the efficiency of the operation, whether or not there is compliance with laws, rules and regulations. 14/

IV. The decision of the NASA Administrator.

Deputy Associate Administrator Moritz explained how the NASA Administrator, Dr. Paine, made his determination under Section 3(b)(4) to deny the Union's petition. Upon receipt of the petition, Moritz held preliminary discussions with Patrick A. Gavin, Assistant Director of Personnel; 15/ and David J. Harnett, Assistant Administrator for Industry Affairs. Moritz then arranged a meeting with Deputy Administrator Dr. George M. Low, and with Harnett and Gavin. At the meeting, they discussed "the nature of the petition, the nature of the alternatives

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12/ Alexander further testified:

> * * * I don't think necessarily that [the audit] employee would work with the Inspections Division, but we would refer any information to the Inspections Division, that we were available to Inspections for consulting with them on this type of a situation as to what we found. It is possible we may have been detailed or assigned to Inspections to work with them, but it would then be an Inspections Division responsibility, not an Audit Division.

13/ As stated, the Audit Division by and large deals with in-house activities of NASA employees; audits of external contracts are handled for the most part by the Department of Defense.

14/ The Union offered into evidence as Exhibits P-2 through P-8 statements assertedly executed by unit employees, generally stating their duties. Counsel for NASA principally objected to the admission of these statements as hearsay. I sustained the objection because the witnesses were not available for cross-examination. No request was made by the Union for a continuance to bring in any unit employees. The Union, in its post-hearing brief, does not pursue its offer of Exhibits P-2 through P-8.

15/ Director Sacks testified that Gavin had extensive discussions with him concerning the petition.

or the manner in which [they] could respond, and secured [Dr. Low's] agreement that [they] would deny the petition."

Moritz explained:

> My decision was based on my knowledge of the issues, instructions and regulations and procedures of the agency, which they [the other participants] also were aware of. I know what the functions and duties and responsibilities of these offices are and it was based on my knowledge in these areas when I made the recommendation * * * to the Deputy Administrator * * *.

Thereupon, Moritz and his associates prepared a denial letter, which was transmitted to Dr. Low for his concurrence. After Dr. Low concurred, the letter was transmitted to NASA Administrator Dr. Paine. Dr. Low personally discussed the matter with Dr. Paine and then Dr. Paine signed the letter.

Exhibit N-6 is the "briefing memorandum," initially signed by Moritz on July 13, 1970. This memorandum was transmitted to the NASA Administrator through Dr. Low. The memorandum states in part:

> FROM: Assistant Administrator for Administration
>
> THRU: Acting Associate Administrator for Organization and Management
>
> SUBJECT: Petition of AFGE Lodge 2842 - AFL-CIO, Regarding Audit Division, NASA Headquarters
>
> DISCUSSION
>
> AFGE Lodge 2842 - AFL-CIO, has petitioned the Department of Labor to conduct an election in order for the Lodge to gain exclusive recognition of a unit consisting of certain employees in the Audit Division (Code DU) of NASA Headquarters.
>
> Labor-Management Relations Executive Order 11491, as did previous Executive Order 10988, does not apply to an office which has as a primary function audit of the conduct or work of officials or employees concerning their honesty or integrity in the discharge of their duties, when the head of an agency determines, in his sole judgment, that the Order cannot be applied in a manner consistent with the internal security of the agency. The reasons for possible exclusion are readily apparent, and as the unit requested by the union is engaged in the functions mentioned above we believe the Order should not apply.

Recommended Action

It is recommended that you deny the petition by signing the attached memorandum. A copy of the memorandum will then be transmitted to the local Lodge President and the Department of Labor.

Thereafter, on July 23, 1970, Dr. Paine wrote Assistant Director of Personnel Gavin, advising Gavin of the determination to deny the petition for reasons stated above.

CONCLUSIONS

The narrow issue raised on remand is whether the determination by the NASA Administrator, that the unit sought to be represented by the Union "has a primary function related to internal security" within the meaning of Section 3(b)(4) of the Executive Order, was made in an "arbitrary or capricious" manner. Of course, as the Council made clear in its decision, the "burden of proof" is on the "union which claims that the action of the agency head was arbitrary or capricious."

It has long been settled in the private sector that "[a]dministrative action may be regarded as arbitrary and capricious only where it is not supportable on any rational basis;" consequently, "something more than error is necessary to spell out arbitrary or capricious action." N.L.R.B. v. Jas. H. Matthews & Co., 342 F. 2d 129, 131-132 (C. A. 3, 1965), cert. denied, 382 U. S. 832 (and cases cited therein); also see, Carlisle Paper Box Company v. N.L.R.B., 398 F. 2d 1, 5-6 (C.A.3, 1968) (and cases cited therein). In short, "[t]he fact that a reviewing court could have reached a decision contrary to that reached by the agency will not support a determination that the administrative action was arbitrary and capricious." And see, Pauley v. United States, 419 F. 2d 1061, 1066 (C.A. 3, 1969; Road Review League, etc., v. Boyd, 270 F. Supp. 650, 663 (S.D. N.Y., 1967); Canty v. Board of Education, etc., 312 F. Supp. 254, 256 (S.D. N.Y., 1970); Motor Freight Lines v. United States, 96 F. Supp. 424, 427 (N. D. Tex., 1951); O'Breirne v. Overholser, 193 F. Supp. 652, 656 (D. C., 1961). 16/

16/ Counsel for both parties have cited cases, noted above, from the private sector to define the term "arbitrary or capricious." Although the cited cases contain language differences, they generally comport with the language quoted above. No reason has been argued, and I can perceive of none, why the definition of "arbitrary or capricious" applied in the private sector should not also be applied under the Executive Order.

Reviewing the action of the NASA Administrator in light of the above, I find that his determination was not arbitrary or capricious. As the essentially undisputed evidence summarized herein shows, a unit auditor is chiefly responsible to review the activities of persons who are performing the work of NASA to ensure compliance with laws, regulations and policies. Such a review will, of necessity, surface facts pertaining to the honesty and integrity of the agency personnel involved. Examples of such disclosures are found in the audit reports and related documents produced by NASA. The audits revealed, inter alia, that a contractor was permitted to exceed the statutory limitation on certain construction; that a contractor was permitted to perform unauthorized in-house engineering services; the questionable use of administrative airplanes on a number of occasions; shortages in certain accounts and related data; a significant number of travel vouchers at substantial variance with prudent business practices; co-mingling of lunch room funds and the related alteration of a cash register tape; and the personal use of equipment at an employee's home. These disclosures were contained in typical audit reports, the preparation of which consumes the major portion of the unit employees' work time. 17/

The Union argues that the NASA Inspections Division, not the Audit Division, has as its primary function the responsibility for ensuring that employees perform their work with honesty and integrity (Br. pp. 19-21). However, as stated, a major aspect of a typical audit is to review the activities of NASA civil service employees to ensure that the prescribed procedures and policies, rules and regulations, and laws are being complied with. Involved is the "legality" as well as the "efficiency" and "appropriateness" of employee activity under audit. And, in my view, the conjunctive phrase "honesty and integrity," as used in Section 3(b)(4) of the Executive Order, would seem broad enough to include the types of indiscretions evidenced by audit reports showing, inter alia, improper

17/ The Union had requested that NASA produce at the hearing "copies of all audit programs" and "all audit reports during the past 3 years which were primarily initiated by the Audit Division to discover fraud and dishonesty by NASA employees or NASA contract employees" (Exhibit P-1). NASA's counsel acknowledged that they "have nothing [that] precisely fits that description * * *." Instead, NASA produced Exhibits N-7 through N-15. The Union, in its post-hearing brief, argues that if the eight reports produced by NASA "purport to be the ones which most vividly illustrate sensitive areas out of" the many prepared during the past eight or more years, "it seems highly doubtful that the Audit Division employees have as a primary function the audit of employees to ensure honesty and integrity * * *" (Br. pp. 15-16).

However, the fact that there are relatively few instances of documented indiscretions and misconduct on the part of audited employees is more probative of the integrity and honesty of the employees than the primary function of the auditors.

use of NASA equipment, falsification of records or documents, co-mingling of personal and agency funds, and related activities. For, even the Webster New International Dictionary (2nd Ed., 1961) definition of this phrase, as quoted by the Union at p. 5 of its brief, broadly defines honesty as

> * * * characterized by integrity or fairness and straightforwardness in conduct, thought and speech, free from fraud, guile or duplicity * * *

and defines "integrity" as "free from corrupting influence or practice * * *." Auditing for the disclosure of criminal conduct or fraud is not a sine qua non for an audit to ensure "honesty and integrity." Rather, an audit meets the limitations of Section 3(b)(4) of the Executive Order if it is principally concerned with, inter alia, employees' trustworthiness, truthfulness, lack of corruption, straightforwardness and related indicia of compliance with laws, regulations, and established procedures.

Further, the evidence of record summarized above makes clear that the NASA Management Audit Office or Division is -- with the Inspections and Security Divisions -- an integral part of the internal security system of NASA. As shown, the Inspections Division is responsible for ensuring that there is adherence to standards of conduct which the Agency believes appropriate for its employees. The Security Division is concerned with safeguarding property, facilities and classified information. The Audit Office or Division is charged with determining whether there has been compliance by NASA personnel with laws and regulations and expected standards of work. In the performance of its functions, the Audit Office surfaces problems and identifies individuals who may be involved in indiscretions or proscribed conduct. There is a close and consistent interrelationship, including the exchange of information, between the Audit, Inspections and Security Divisions. Consequently, I cannot find that the NASA Administrator was arbitrary or capricious in determining that a primary function of the Audit Division is the audit of work of officials or employees for the purpose of ensuring honesty and integrity in the discharge of their official duties and that the Executive Order cannot be applied to the requested unit in a manner consistent with the internal security of NASA.

Recommendation

Upon the basis of the foregoing findings and conclusions, I recommend that the Assistant Secretary sustain the dismissal of the representation petition filed herein.

Frank H. Itkin
Hearing Examiner

DATED: November 11, 1971
Washington, D. C.

January 24, 1972

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

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
HOUSTON AREA OFFICE - SOUTHWEST
REGION, HOUSTON, TEXAS
A/SLMR No. 126

This case involves a complaint filed by Bobby J. Stephens, an individual, against the Department of Transportation, Federal Aviation Administration, Houston Area Office - Southwest Region, Houston, Texas alleging a violation of Section 19(a)(2) of the Executive Order.

The events giving rise to the complaint occurred when the Complainant was not selected in July 1970 for a position in Austin, Texas on which he had bid. The Complainant alleged that his non-selection was based on his membership in and activities on behalf of a labor organization, the Professional Air Traffic Controllers Organization, Inc. (PATCO).

The Complainant, a long-time employee of the FAA, first bid on a job in the Austin facility in June 1969, at which time he disclosed his PATCO membership during an interview with the director of that facility. Following this disclosure, allegedly he was harrassed, and subsequently, was given a poor "Employee Appraisal Report." However, this report was revised and a new appraisal finding his work satisfactory was submitted as part of his employee file when he again applied for an Austin position in July 1970. Complainant theorized that his PATCO membership was related to his unsuccessful attempt in 1970 to obtain the appointment and that, therefore, the Activity's conduct violated the Order.

Under all the circumstances, the Assistant Secretary agreed with the Hearing Examiner's finding that the Complainant had not established that his failure to obtain the Austin position was based on union considerations in violation of Section 19(a)(2). Moreover, the Assistant Secretary agreed with the Hearing Examiner's determination not to consider certain conduct of the Respondent under Section 19(a)(1) of the Order where the complaint did not allege violation of Section 19(a)(1), the Complainant had failed to amend his complaint at the hearing to allege a 19(a)(1) violation, and some of the conduct in question appeared to be time-barred under the Assistant Secretary's Regulations.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
HOUSTON AREA OFFICE - SOUTHWEST
REGION, HOUSTON, TEXAS

Respondent

and

Case No. 63-2508(CA)

BOBBY J. STEPHENS

Complainant

DECISION AND ORDER

On September 21, 1971, Hearing Examiner Henry L. Segal issued his Report and Recommendations in the above-entitled proceeding, finding that the Complainant had not met the burden of proof with respect to the Section 19(a)(2) allegations contained in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions or briefs were filed to the Hearing Examiner's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Hearing Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Hearing Examiner's Report and Recommendations and the entire record in the subject case, I hereby adopt the findings, conclusions and recommendations of the Hearing Examiner. 1/

1/ As noted by the Hearing Examiner, the record disclosed certain conduct by the Respondent which arguably could be viewed as interfering with employee rights assured by the Order in violation of Section 19(a)(1). Upon review of the evidence, I find that certain conduct of the Respondent does, in fact, raise substantial questions as to whether Section 19(a)(1) was violated. However, in the particular circumstances, including the fact that the complaint herein did not allege violation of Section 19(a)(1), that the Complainant, when given the opportunity, did not choose to amend the complaint at the hearing, and that some of the conduct in question might be time-barred under Sections 203.1 and 203.2 of the Assistant Secretary's Regulations, I agree with the Hearing Examiner's determination not to consider such conduct under Section 19(a)(1) of the Order.

ORDER

Pursuant to Section 6(a)(4) of Executive Order 11491 and Section 203.25(b) of the Regulations, the Assistant Secretary for Labor-Management Relations hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

Dated, Washington, D. C.
January 24, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

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

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
HOUSTON AREA OFFICE-SOUTHWEST REGION
HOUSTON, TEXAS

Respondent

CASE NO. 63-2508(CA)

and

BOBBY J. STEPHENS

Complainant

James E. Gill, Chief, Employee-Management Relations Branch, Southwest Region, P.O. Box 1689, Fort Worth, Texas 76101, for the Respondent

William N. Wheat, Esq., 715 Houston Citizens Bank Building, Houston, Texas 77002, for the Complainant

Before: Henry L. Segal, Hearing Examiner

REPORT AND RECOMMENDATIONS

Statement of the Case

This proceeding, heard at Houston, Texas, on July 13 and 14, 1971, arises under Executive Order 11491 (herein called the Order) pursuant to a Notice of Hearing issued by the Regional Administrator of the Labor-Management Services Administration, United States Department of Labor, Kansas City Region, on March 1, 1971, in accordance with Section 203.8 of the Regulations of the Assistant Secretary for Labor-Management Relations (herein called the Assistant Secretary). It was initiated by a complaint filed by the Complainant on December 2, 1970, alleging that Respondent has engaged in and is engaging in violations of Section 19, subsection (a)(2) of the Order.

Section 19(a)(2) of the Order 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 complaint involves the sole allegation that the Respondent failed to select Complainant for promotion on an announcement of Respondent seeking bids for certain positions which closed on or about June 26, 1970.

At the hearing both parties were represented by counsel who were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue orally and file briefs. Upon the entire record in this matter, from observation of the witnesses and after due consideration of the briefs filed by the parties, on August 23, 1971, I make the following:

Findings and Conclusions

I. Facilities Involved

The Southwest Region of the Federal Aviation Administration (herein called the FAA), headed by a Regional Director, includes the Houston Area headed by an area manager, N.E. Peterson. The facilities in the area immediately involved herein are the William P. Hobby Airport in Houston, Houston Intercontinental Airport, and the Austin, Texas airport.

II. The Issues

The Respondent issued an announcement, identified as FPP-SW-70-297, on June 12, 1970, of openings for GS-12 air traffic controllers at the Austin, Texas tower. Bobby Stephens, who bid for the openings, was not selected. The sole issue presented here is whether the non-selection of Stephens was based on his membership in and activities on behalf of a labor organization, Professional Air Traffic Controllers Organization, Inc., (herein called PATCO), the Respondent thereby discouraging membership in a labor organization in violation of Section 19(a)(2) of the Order.

III. The Unfair Labor Practices

A. Complainant's Assignments

After four years as an air traffic controller in the Air Force, Bobby Stephens was hired by the FAA as an air traffic controller specialist trainee, GS-6, at Moisand Tower in New Orleans, Louisiana, in March 1960. He progressed to a GS-8 air controller specialist classification at Moisand. In late April 1961, he transferred to Hot Springs, Arkansas as an Air Traffic controller taking a cut to GS-7. According to Stephens, he made the change because of climate and because his wife came from Little Rock, Arkansas. He remained at Hot Springs for the lengthy period of seven and one-half years because he enrolled in a business course at Henderson College

located at Arkadelphia, Arkansas and it required that time to receive his B.S. degree. In January 1968, in anticipation of receiving his degree, Stephens, who had progressed to grade GS-10 at Hot Springs, began to bid on jobs in order to receive a promotion. He put in bids for jobs at Little Rock, San Antonio, Houston Intercontinental, and at William P. Hobby Airport (herein called Hobby) in Houston, Texas. He was successful on his bid to Hobby and obtained a GS-11 air controller specialist position at Hobby on September 8, 1968. He reported for duty at Hobby in October 1968, where he is still employed.

B. Stephens' Activity on Behalf of Professional Air Traffic Controllers Organization, Inc.

At all times material herein while employed at Hobby, Stephens was a member of the Professional Air Traffic Controllers Organization, Inc. (PATCO). He was also facility director for PATCO at Hobby during most of his career at Hobby until approximately two or three months before the date of the hearing, July 13, 1971. There are approximately 14 air traffic control employees at Hobby, and according to Stephens, all 14 were members of PATCO when he arrived at Hobby in October 1968. As will be discussed later in this report, the membership in PATCO ultimately fell to one member, Stephens.

C. Stephens' Earlier Bids for Promotions, 1968 and 1969

While I do not have before me for disposition the issue as to whether non-selection of Stephens on bids for positions made prior to the June 1970 bid was violative of the Order, it is necessary to discuss them inasmuch as Complainant contends that his problems arose after he was turned down on a bid for a position at the Austin, Texas tower in June 1969.

Preliminarily to a discussion of the bids, the motives for bidding on new positions should be mentioned. Aside from obvious motives such as desires for certain geographical locations, it is often necessary to bid on jobs at different locations in order to obtain a promotion. The facilities of the FAA are classified into four levels depending on various factors such as amount of air traffic and instruments used. Each of the levels have different grade structures. Thus, Hobby is a level II facility where the journeyman grade is GS-11 and Austin is a level III facility where the journeyman grade is GS-12. Further, the levels of supervision are different at the various facilities so that at a level III facility it is possible to promote into a supervisory grade direct from a GS-12 journeyman grade. Stephens made his various bids in order to seek promotions and further his career in FAA. 1/

1/ It is interesting to note that early in his career, Stephens bid from Moisand tower where the journeyman grade was GS-11 to Hot Springs where the journeyman grade was GS-10, thus moving back. However, as noted above, Stephens did this for personal reasons.

Inasmuch as Complainant alleges that his difficulties commenced with his June 1969 bid for a position at the Austin, Texas tower, it is essential to discuss the testimony of Stephens' facility chief at Hot Springs, Arkansas concerning Stephens' performance there and a bid he previously made while at Hot Springs for a position at Austin, since Finis Wilcoxson and Richard Hagans were facility chief and assistant facility chief, respectively, at Austin at that time as well as in June 1969.

Morris S. Gaskill, facility chief at Hot Springs, Arkansas, had Stephens under his supervision for the seven and one-half years that Stephens was employed at Hot Springs. Gaskill credibly testified that while Stephens was technically a good controller, he was not a good teamworker. Stephens was argumentative and lacked tact in his relationships with his fellow employees. At a level I tower, the journeymen are all GS-10's, and it was required that journeymen be rotated as watch supervisors. Stephens always complained about being required to act as a supervisor when he was not getting supervisor pay. Whenever Gaskill completed annual Employee Appraisal Reports he would grade Stephens less than the best on elements relating to teamwork and fairness and impartiality to fellow employees. Gaskill discussed these faults with Stephens many times, and Stephens would always argue that Gaskill was wrong. As noted above, beginning in January 1968, Stephens began to look forward to graduating from his business course at Henderson College, and to seek promotions. Stephens bid for a position in Little Rock, Arkansas and in June or July he bid for one at Austin tower. Finis Wilcoxson, Facility Chief at Austin, called Gaskill from Austin to discuss Stephens' bid. In response to Wilcoxon's questions Gaskill indicated that Stephens would make a good controller. However, Wilcoxson asked Gaskill about Stephens' Employee Appraisal Report and why he was rated low in teamwork, and fair in certain other elements. Gaskill then explained Stephens' shortcomings to Wilcoxson. Later, Stephens accused Gaskill of deliberately cutting him down for the Little Rock and Austin jobs. Gaskill explained that he did not talk to the Little Rock facility chief but that the Austin chief called him, he did not call the Austin chief.

All of this occurred before PATCO was in the picture, and there is no evidence in the record that Stephens was active in PATCO at the time he was stationed at Hot Springs. Complainant did not rebutt the testimony of Gaskill.

With respect to Stephens' ultimate selection for his present position at Hobby, Gaskill was not asked for a recommendation on Stephens.

Within a few months after Stephens was transferred with a GS-11 promotion to Hobby he began to bid on other jobs, including promotions available at Austin tower. On these early bids, Stephens admits that he was not qualified because he was not "facility rated." He had just moved from a level I facility at Hot Springs to a level II facility at Hobby in

October 1968, and it normally takes from three to six months' training to "check out" on instruments used at a level II facility.

Subsequent to being "facility rated" at Hobby, Stephens bid on jobs at Dallas and Austin. (Later in this report in my discussion of Stephens' bid in 1970 for a position at Austin, which is the subject of the complaint, I will discuss the procedure in detail for processing of bids for promotions. For the present it is clear from the record that the selection of individuals from eligibility lists provided by the personnel office is in the discretion solely of the facility chief involved. He has before him for consideration the applicant's Employee Appraisal Reports and the applicant's employment profile furnished by the personnel office. No interview is required, but an applicant may choose to visit the facility chief for an interview.) In connection with his June 1969 bid for a job at Austin, Stephens voluntarily visited Austin on June 13, 1969, for an interview. He was interviewed by Facility Chief Wilcoxson and Assistant Facility Chief Hagans. Stephens testified that the interview was cordial and that he thought that he had impressed Wilcoxson. However, during the course of the interview he was asked if he belonged to any organization. Stephens replied that he belonged to PATCO and before that to the Air Traffic Controllers Association. Stephens was not selected, and according to Stephens all of his troubles started after that interview since, he states, this is the first time the FAA discovered his membership in PATCO.

It is necessary to digress at this point and discuss Respondent's explanation for the questioning with respect to membership in an organization. Several years ago the Civil Service Commission issued an interview guide with sample questions. These sample questions were distributed by the FAA to facility chiefs and others involved in interviewing applicants. Among the sample questions listed was the question "are you active in any local organization?" There were follow up questions as to what offices the applicant held and what value the activity had for the applicant. The purpose of such questions, aside from any possible ulterior motive with respect to membership in a labor organization, is to develop an idea of the applicant's interests and his service to the community. Of course, with the advent of labor organizations in the Federal Government and Executive Order 10988, succeeded by Executive Order 11491, an employee applicant could imply from such question that he was being asked about his union activity, and such general question might be interference with an employee's rights assured by the Order. Other applicants were asked the same question, and as will be discussed below, Stephens and others were asked the same question in connection with the 1970 bid at Austin. However, I am not called upon to determine here whether such question is violative of the Order, since the complaint does not allege violations of Section 19(a)(1) of the Order. In any event, perhaps because of this case, the Director of the Southwest Region, FAA, issued a memorandum on January 5, 1971 to all supervisors advising them not to ask the question, which was designed to elicit information on participation in civic, pro-

fessional or community sponsored projects, since it could be misinterpreted by employees as an inquiry into their union membership and activity. 2/

Witnesses presented by the Complainant testified to PATCO animus of Wilcoxson. Thus, Roger Kennedy, PATCO's facility chief at Houston Intercontinental Airport, testified that in December 1969 he heard Wilcoxson, who sometime after June 1969 transferred from Austin to Houston as facility chief, shout out of his window to the Regional Vice President of PATCO, "I killed PATCO at Austin and I intend to kill it here. We don't need you at this facility." Another witness employed at Houston testified that in September 1969, Wilcoxson said to him, "Why mess around with PATCO. I can get you as much or more." 3/

D. Events at Hobby After June 13, 1969

Complainant alleges that his problems arose at Hobby after his June 13, 1969 interview with Wilcoxson when for the first time he disclosed his membership in PATCO to an official of the FAA. Inasmuch as the complaint is limited to an allegation of failure to promote Stephens on a bid for a job in June 1970, the following matters will be discussed for the purpose only of ascertaining their possible impact on the motive of Respondent in failing to select Stephens for promotion in 1970. 4/

(1) The Systems Error of June 20, 1969 and Simultaneous Landing Problem

One week after his interview with Wilcoxson on June 13, 1969, Stephens was charged with his first systems error.

The FAA Handbook which governs the work of the controllers requires 6000 feet separation between landing and departing aircraft. On June 20, 1969, it was reported to Raby Johnson, facility chief at Hobby, that Stephens had cleared two aircraft without the necessary separation. In accord with set procedures, Johnson appointed a facility review board consisting of Glen Wittage, Watch Supervisor at Hobby, and two journeymen, McCorkle and Stinson.

The purpose of a review board is to determine the cause of the error and to seek means of prevention of recurrences. There is no built-in discipline action provided for a systems error.

Raby Johnson testified without contradiction that the witnesses at the Board all stated that the separation of aircraft involved was 4000 to 4500 feet, and that when he spoke to Stephens about whether there was 6000 feet separation, Stephens replied, "What else can I say, if I say less than 6000 feet, I would be admitting that a systems error occurred."

McCorkle, a member of the Board testified that both he and Stinson thought there was no error. When he inferred that there was no democracy on the Board because of Watch Supervisor Wittage's insistence that there was an error, he went to Johnson and asked to be relieved from making a

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2/ All of those, including Stephens, that testified with respect to being questioned upon applications for promotion, stated that they were asked whether they belonged to any organizations. In cross-examination of Melvin N. Asher, Chief of Personnel for the Houston Area, it was elicited that in a report prepared by him in investigating the unfair labor practices he noted that the question asked was whether the applicant belonged to any employee organization. Asher testified this was an error in language. At any rate, I am bound by the testimony at the hearing, not reports prepared by the Respondent in its investigation of the unfair labor practices.

3/ Again I am not called upon to make any findings with respect to whether such statements by Wilcoxson would be violative of Section 19(a)(1) of the Order since the complaint does not allege any violations of Section 19(a)(1). Moreover, these events would be barred as a basis for a finding of a violation by Section 203.1 of the Assistant Secretary's regulations since they occurred prior to January 1, 1970, the effective date of the Order. I will, however, consider this evidence for background and relevance to a finding of animus against PATCO by the Respondent.

4/ Complainant argues in his brief that although he has not alleged violations of Section 19(a)(1) of the Order, I can find certain events to be violative on a "derivative" theory. A "derivative" theory merely means that a violation of other sections of 19(a) may also be violative of Section 19(a)(1). However, I am not free to find independent violations of Section 19(a)(1) of the Order unless such violations are alleged in the complaint. Further, some of these events would be barred as a basis for a finding of violation by Section 203.1 of the Assistant Secretary's regulations since they occurred prior to January 1, 1970, the effective date of the Order, and others would be barred by Section 203.2 of the Assistant Secretary's regulations since they occurred more than six months prior to the filing of the unfair labor practice charge and more than nine months prior to the filing of the complaint.

decision and to be excused from the Board. Johnson testified that there had already been three days of hearing when McCorkle came to him, and that McCorkle merely stated to him that he could not arrive at a decision, and asked to be relieved. Johnson refused, stating that it was McCorkle's duty to complete his job. 5/

The Board issued a report to Johnson that a systems error had occurred. The report was signed by the chairman, Wittage. Only the chairman's signature is required. (At Hobby another systems error has since been called, involving a watch supervisor, after a hearing by a board of review.).

Stephens also had a problem in mid-1969 with respect to simultaneous landing of aircraft on two intersecting runways, runways 21 and 17 at Hobby Field. Stephens thought it was unsafe. The FAA handbook was silent on the problem. Supervision was of the opinion that it was all right. While other controllers may have felt the same way as Stephens about the problem, Stephens was the only one that refused to permit such simultaneous landings and argued with Johnson and his other supervisors about it. Johnson was forced to get a ruling from the FAA saying it was permissable, and Johnson issued a memorandum in August 1969 ordering such simultaneous landings. Subsequently, the FAA manual was revised to permit simultaneous landings on such intersecting runways.

(2) Alleged Anti-PATCO Statement of Hobby Facility Chief Raby Johnson and Special Achievement Awards

According to Stephens, at the time he became PATCO's facility director, in October, 1969, 100% of the controller's were members of PATCO. In November, 1969, Stephens discussed with Johnson the possibility of obtaining exclusive recognition for PATCO at Hobby under the then existent Executive Order, 10988. According to Stephens, Johnson indicated PATCO was not eligible to apply, but if Stephens did, he would throw the application in the "trash can." Johnson, on the other hand, testified that he told Stephens there was a doubt as to eligibility because instructions from headquarters denied the eligibility of PATCO at locations where there had been an organized "sick out." (Such as occurred at Hobby on June 18 and 19, 1969.) He denied that he told Stephens that he would throw an application in the "trash can," and actually when Stephens subsequently

5/ McCorkle did not testify that he advised Johnson that there was no error or that he thought the Board was undemocratic. According to Johnson, McCorkle did say that this error occurred at a bad time. Apparently McCorkle was referring to a "sick out" of controllers which occurred at various facilities of the FAA on June 18, 19 and 20, 1969. There were controllers at Hobby who reported sick on June 18 and 19, but by June 20, there was a regular force on duty. Press reports indicated that the "sick out" was instigated by PATCO.

applied on behalf of PATCO, the application was transmitted to FAA headquarters.

By mid-1970 membership in PATCO dwindled to only one, Stephens. Complainant attributes this decline in membership to alleged anti-PATCO statements by Johnson and issuance of Special Achievement Awards to controllers allegedly as rewards for resigning from PATCO.

Boyce McCorkle, an air traffic controller at Hobby testified that in February 1970, after he came off of a shift, Facility Chief Johnson asked him to join him for a cup of coffee. During the conversation, Johnson told McCorkle that it would be better for his career if he would disassociate from PATCO and the leadership thereof.

Stephens testified that he was called into Johnson's office in February 1970 and was told by Johnson that it would be to his advantage to disassociate from PATCO, and its officers, Carl Evans, PATCO Regional President and Mike Rock, PATCO Board Chairman.

In assessing these alleged statements of Johnson, it must be noted that on June 18, 19 and 20, 1969, there was a "sick out" of controllers allegedly fostered by PATCO. In a case decided by the Assistant Secretary, Professional Air Traffic Controllers Organization, Inc., A/SLMR No. 10 (January 29, 1971), the Assistant Secretary found that PATCO had violated Section 19(b)(4) of the Order by engaging in an illegal strike. The recital of facts in that case indicates that throughout latter 1969 and early 1970 there were press releases and statements by officials of PATCO indicating that the controllers were going to strike, culminated by an actual strike by controllers commencing March 25, 1970, and lasting several days thereafter. (None of the Hobby controllers participated in the strike.)

According to Raby Johnson, Raymond Shaffer, FAA Administrator, issued a General Notice (GENOT) in March, 1970 to all facilities cautioning employees not to engage in a strike, that it could jeopardize their careers, and instructing facility chiefs to discuss the matter with their employees. Johnson, credibly testified that, in accordance with Shaffer's General Notice, he spoke to all the employees in March, 1970. (Johnson testified that McCorkle and Stephens were probably in error in placing these statements in February.) He told the employees that they would be wrong to strike and that they should not be misled by irresponsible PATCO leadership. He admitted that he did make a special effort to meet McCorkle early one morning to give him the message because McCorkle was on a night shift and he did not want to miss passing on Administrator Shaffer's comments. Johnson denied that he specifically told the employees to disassociate from PATCO, rather he told them to disassociate from irresponsible leadership.

There was considerable testimony by Stephens as to controllers dropping out of PATCO and then receiving Special Achievement Awards. First,

it should be noted that Stephens was not definite as to times. For example, he estimated the approximate dates that controllers dropped their membership in PATCO by referring to machine listings issued by PATCO, and concluding that the individual dropped out sometime before the final listing of that individual's payment of dues. Second, no evidence was presented to show direct knowledge by the Respondent of drop-outs from PATCO before granting the awards. Stephens testified as follows with respect to the experience of certain controllers at Hobby.

Westover disassociated from PATCO in March or April 1970, and received an award in May 1970. Westover also got a promotion to Dallas three months later. Magee disassociated from PATCO in March or April 1970, and received an award in April 1970. Magee later was promoted to GS-12. Ramos disassociated from PATCO in April or May 1970, and received an award in May 1970. Casford disassociated from PATCO in March, April or May 1970, and received an award two or three months later. Hill disassociated from PATCO in July 1970, and received an award in May 1971. Salter disassociated from PATCO in April or May 1970, and received his award in July or August. Salter was later promoted to Dallas.

According to Respondent, with respect to the grant of a Special Achievement Award, a supervisor must first write up the request for such an award for Johnson's approval. It then must be transmitted to Lewis Enochs, Chief of the Operations Branch of the Houston Area for approval, which normally takes another two months. It then requires another 30 days for issuance of the check and the certificate. Thus, according to Respondent, assuming the validity of Stephens' testimony most all the awards were initiated before the controllers involved dropped out of PATCO.

Actually, as of the time of the hearing, nine special achievement awards were issued, two in 1969, five in 1970, and two in 1971. One controller, Caffey, testified that he received his special achievement award in September 1969, and dropped out of PATCO later in January 1970. Recommendations for awards to controllers' McGee and Westover were initiated in February 1970, and they had not dropped out of PATCO until March or April 1970. There was no direct testimony from anybody that they received awards for dropping out of PATCO or that anybody advised Johnson or other supervisors at Hobby that they dropped out.

With respect to Johnson's alleged discrimination toward PATCO members, there was considerable evidence to negate such discrimination. For example, Stephens admitted that two controllers were promoted in 1969 to other locations while members of PATCO. Johnson hired a supervisor at Hobby who had noted on his Appraisal Record that he was a member of PATCO and also hired an individual for a promotion to Hobby notwithstanding that this individual advised him that he was a PATCO leader at the FAA's Albuquerque facility.

With respect to the drop in PATCO membership at Hobby, there was no evidence that the drop was due to Johnson's efforts. In fact, most of the resignations testified to occurred in the early half of 1970 when there were rumors of a strike by PATCO and an actual strike by PATCO commencing March 15, 1970. The two controllers who testified with respect to their resignation from PATCO testified that they did so because of the irresponsible leadership of PATCO.

(3) Stephens' Employee Appraisal Reports at Hobby

Prior to December 1968, there was only one field at Houston, Hobby. In December 1968, Houston Intercontinental Airport was opened and Hobby was made a separate facility. Raby Johnson was made facility chief at Hobby. Although facility chiefs are given the option of selecting their own people, since Hobby was a new facility, Johnson was handed personnel, including Stephens.

In early 1969, Stephens indicated that he wanted to bid on the Austin job, and wanted an up-to-date employee's appraisal for use on the bid. Accordingly, a special employee appraisal was prepared for Stephens by his then immediate supervisor, Watch Supervisor Wolraven, covering the period from February 1, 1969, after Stephens qualified as a level II facility controller, to June 9, 1969. This was an excellent appraisal which included the remarks by Walraven, "Mr. Stephens is an excellent tower controller. I feel he would also make an excellent radar controller, even though he has no radar experience. Has an excellent sense of timing and control ability." Raby Johnson signed this appraisal as second level supervisor. Johnson testified that he thought the appraisal was rather high, but he let it go through.

After Stephens was turned down on his bid for the Austin position in June 1969, he accused Johnson of preventing him from getting the position. Stephens said he was discriminated against by his chief at Hot Springs and that Johnson and other supervisors were discriminating against him. Johnson told Stephens that his attitude was bad, that he was constantly complaining. He denied to Stephens that he had anything to do with Stephens June 1969 turn down. Johnson testified that the only communication he had with Hagans, Deputy Chief at Austin, and Wilcoxson, then Chief at Austin, on the June 13, 1969 bid was a call from them asking him to rate the three bidders from Hobby for that job. There was no mention of PATCO during this conversation.

Stephens testified that on three occasions Johnson told Stephens that his attitude was bad, and as long as it was bad he would never leave Hobby. Johnson denied that he told Stephens he would never leave Hobby. Also, Stephens testified that in one of these conversations, Johnson threatened to take away Stephens' specialty rating. Johnson denies this. However, admittedly there were many arguments between Johnson and

Stephens, usually initiated by Stephens' complaints about lack of promotion, FAA policies, etc. In one of these discussions, according to Johnson, Stephens brought up the relationship of PATCO and the FAA. Stephens averred that if he belonged to an organization, and its philosophies and requirements conflicted with management, the organization's requirements should take precedence. Johnson disagreed.

In the meantime, the systems error, discussed above, occurred and the problem of simultaneous landings on intersecting runways occurred. In fact, according to Wittage, his then watch supervisor, Wittage relieved Stephens of duty one day because of his refusal to obey orders and permit simultaneous landings. Stephens told Wittage the procedure was not correct regardless of what the supervisors said. Stephens also complained to Wittage about his progress in the Agency and that things in his record were hurting his career. Wittage also testified, without rebuttal by Stephens, that on one occasion Stephens lost five planes.

Subsequently, on August 31, 1969, Wittage prepared Stephens' next regular Employee's Appraisal to cover the period from September 7, 1968 to September 7, 1969. Stephens was radically marked down from his previous Special Appraisal given him by Walraven. In the remarks section, Wittage stated:

> "Mr. Stephens has a very undesirable attitude. This is expressed through his comments and actions in the presence of his co-workers. These comments tend to create dissension among his co-workers. He has the knowledge and capability to perform his duties in an effective manner, but displays an attitude which indicates he will not use his initiative, and that he intends only to do his job and no more.
>
> Following are some comments made by Mr. Stephens in the presence of his co-workers:
>
> He would not work Local Control for a total of three hours in one day.
>
> He would not do anything unless the Watch Supervisor told him to.
>
> He should receive hazardous duty pay for working local control.
>
> Mr. Stephens has expressed a desire to 'get ahead' but has done nothing to impress his supervisors that he has the potential. He appears very self-centered, with only his own interest in mind, not those of the FAA." 6/

After this appraisal, Stephens complained to Johnson that the rating was unfair, and he especially disagreed with Wittage's remarks. Johnson explained that if he improved, under FAA procedures, he could be given a new appraisal after 90 days. Johnson instructed his supervisors to watch Stephens for improvement with a view to upgrading Stephens' appraisal. He did this because he knew that Stephens wanted to bid out of Hobby, and he would not have much of a chance with the August 31, 1969 appraisal. 7/

Accordingly, approximately 90 days later, Stephens was given a new employee appraisal covering the period from September 7, 1969 to January 16, 1970. His rating was improved on most elements over the August 31, 1969 appraisal, and there were no remarks of supervisors.

(4) Johnson's Suggestion that Stephens visit the Flight Surgeon

In November, 1970, after the unfair labor practice charges herein were filed with the agency, and after Stephens was turned down for the June, 1970 vacancy (the subject of the complaint herein) discussed below, Johnson suggested that Stephens visit a flight surgeon to discuss his problems. This meeting with the flight surgeon never was arranged. According to Johnson, he thought that Stephens had many problems evidenced by Stephens' many complaints and his feelings of being discriminated against in many ways by the Respondent, and he felt a discussion with a flight surgeon would help Stephens.

It may well be that Johnson made the suggestion to Stephens because Stephens filed the unfair labor practice charges. However, again under the complaint filed herein, I am not called upon to make a finding as to whether the suggestion of an appointment with the flight surgeon is violative of the Order, or whether Johnson's difficulties with Stephens, which I find below were not attributable to Stephens' membership in PATCO, justified Johnson's idea that a visit to a doctor might help Stephens in his career. At any rate, the impact of this incident on the non-selection of Stephens in June 1970, occurring after the non-selection, is highly remote.

6/ Stephens did not deny that he made remarks to employees such as noted in the appraisal. Employees testified that Stephens constantly complained about promotions, work policies, and the way he was being treated.

7/ Stephens appealed the August 31, 1969 appraisal to Lewis Enochs, Chief, Air Traffic Operation Branch, Houston Area, who denied the appeal.

D. The June 1970 Austin Bid

The processing of the vacancies at Austin was in accord with normal FAA procedure, described herein.

When a facility chief has vacancies he turns in a request to the Regional Office, in this case located at Fort Worth, Texas. The personnel office then issues advertisements for jobs. The advertisement of the jobs in question was designated FPP-SW-70-297, and Ft. Worth issued the notice on June 13, 1970 listing the requirements and seeking bids. It was posted throughout the five state Southwest Region providing that bids could be filed anytime before the closing date, June 26, 1970. Normally, the Personnel Office provides a listing of three to five eligibles for each job involved to the facility chief. There were 17 applicants for the jobs in issue, and since there were five jobs to be filled all 17 applicants were listed as "best qualified." Sixteen applicants, including Stephens, were from the Southwest Region, and one was from the Southern Region. (There is a procedure for bidding across regional lines.) The Personnel Office submitted to the facility chief each applicant's employee appraisal (in Stephen's case his January 22, 1970 special appraisal) and his employee profile, a machine listing of experience, places of service, education, past awards, and any other training.

The selections from the list of eligibles is at the sole discretion of the Facility Chief. No interviews are required of applicants, but applicants may choose to set up interviews with the Facility Chief involved.

The Facility Chief at Austin, who had replaced Wilcoxson, was Raymond Sherfy. The Deputy Facility Chief was still Richard A. Hagans.

There was no communication between Sherfy and/or Hagans and Johnson concerning the qualifications of any of the applicants for the five jobs involved. Johnson's only role was one requested by Stephens. Stephens wanted to be certain that his latest employee appraisal would be considered. Johnson and Stephens visited Lewis Enochs, Chief of the Operations Branch in Houston on June 24, 1970, to request that the latest appraisal be submitted to Sherfy and to request of Enochs that he set up an interview with Sherfy for Stephens. Enochs subsequently called Sherfy and Hagans and told them that Stephens would be calling for an interview. Enochs made no recommendations with respect to Stephens except to ask Sherfy and Hagans to take a good look at him.

Sherfy made his five selections on July 20, 1970. He only interviewed one of the applicants prior to the selections, Armando Ramos of Hobby, who had requested the interview. The other four were not interviewed. His five selections were James W. Caffey from Hobby, Armando R. Ramos from Hobby, Eugene Jeffus from Chattanooga, Reuben Gonzalez from Abilene, and James C. Kelly from Beaumont-Port Arthur. Sherfy and Hagans testified

that the five selected had better appraisals than Stephens, one had an outstanding performance rating, and three had received special achievement awards.

According to Sherfy, Stephens called for an interview after he had already made the selections. Stephens was interviewed by Sherfy and Hagans in mid-August 1970. Sherfy testified that he told Stephens that all five selections were already made. Stephens testified that Sherfy told him that four of the five selections were already made. 8/

During the course of the interview, in accordance with the suggested questions for interviewers discussed above, Sherfy asked Stephens what organizations he belonged to. Stephens replied PATCO and the Methodist Church. 9/ Ramos, who was interviewed previously was asked the same question. Ramos mentioned certain organizations and volunteered that he had been a member of PATCO. 10/

Apparently, Stephens considered himself better qualified for selection than some of those selected because of his long seniority with FAA. According to the Respondent, seniority is not the dispositive factor in making selections for promotions. However, while Stephens had a long tenure with FAA, he was in grade as a GS-11 and had experience at a level II facility such as Hobby for only one and one-half years. The two selections made from Hobby, Ramos and Caffey, had equal or longer service at Hobby. 11/

Both Caffey and Ramos, who were selected from Hobby had received Special Achievement Awards, and had better appraisals than Stephens.

The fact that Stephens had bid two times for the Austin job is not significant since the record reveals that Austin is considered a desirable

8/ Melvin Asher, Chief of Personnel for the Houston Area testified that Sherfy's list of five selections was received at the personnel office on July 24, 1970

9/ Hagans, who was present at Stephens' interview with Wilcoxson in June 1969, when Stephens, in response to Wilcoxson's question concerning membership in organizations replied PATCO, testified that he did not tell Sherfy prior to the interview or the selections that Stephens was a member of PATCO.

10/ Although Ramos dropped out of PATCO in 1970 (he testified that he was disgusted with the way PATCO was operating), he has rejoined PATCO since his employment at Austin.

11/ As noted above, most of Stephens' experience as a journeyman was at a level I facility, Hot Springs. Austin is a level III facility.

location at the FAA, and there are many repetitive bids for Austin. Caffey, a successful candidate, testified that he had bid five times for a job at Austin.

With respect to the allegation of discrimination against PATCO members for selection, selectee Jeffus was a member of PATCO and, in fact, was facility director for PATCO at his previous station, Chattanooga. Another selectee, Gonzalez may have also been a member of PATCO.

Conclusions

As previously noted the sole issue before me is whether Bobby Stephens was denied his bid on vacancies announced in June 1970 for a position at the Austin tower because of his membership in and activity on behalf of PATCO.

Admittedly, the selection of controllers for the five vacancies involved was completely within the discretion of Raymond Sherfy, the facility chief at Austin. However, the record reveals that his assistant, Richard Hagans, had a role in the selection process. Hagans was involved with Wilcoxson, then facility chief at Austin, in the 1969 interview of Stephens for previous vacancies at Austin when Stephens disclosed his membership in PATCO. Accordingly, it is clear that at least one of those officials was involved when the selection was made. However, mere knowledge of Stephens membership in PATCO is not conclusive that the reason he was not selected was such membership. To sustain his burden, the Complainant must show by a preponderance of the evidence that he would have been selected had it not been for his membership in PATCO.

The theory of the Complainant is that after he was interviewed by Wilcoxson and Hagans in June 1969, and disclosed his membership in PATCO, he was coerced in various ways at his job at Hobby because of his membership in PATCO; that this coercion was transmitted in some manner to Sherfy, who made the appointments on the June 1970 bids at Austin, and that a basis for Sherfy's denial of an appointment to Stephens was his PATCO membership and activity.

Although there is no evidence of any communication between Sherfy and other officials of FAA concerning any problems of Stephens that may have arisen because of Stephens' membership in PATCO, and although I am not called upon under the complaint herein to reach any conclusions as to whether any of the Respondent's actions at Hobby were violative of the Order, it is necessary for me to determine whether Stephens' problems were related to his membership in PATCO for any impact they may have had on the failure to select Stephens for the vacancies in question.

That there was animus against PATCO during the times material herein on the part of Raby Johnson, Facility Chief at Hobby, and other officials and supervisors of the FAA must be conceded. But, such animus was a natural response in view of PATCO's activities with respect to "sick-outs," public pronouncements indicating strike activity, and a strike in violation of the Order. These activities are substantially set forth in the Assistant Secretary's decision in which he found the strike to be violative of the Order. 12/ Thus, it was not coercive for Johnson, in compliance with a directive from his superior, to advise his employees, including Stephens, of the consequences of following the leadership of PATCO and engaging in activity which would be illegal. 13/

With respect to the resignations of employees from PATCO membership, there is no evidence that these resulted directly from the activity of the Respondent. It is reasonable to make the assumption that some government employees would want to leave an organization that was advocating and did participate in a strike proscribed by the Order. In fact, those that testified with respect to their reasons for leaving PATCO stated that they did so on their own volition because they disagreed with PATCO's actions. In the same vein, I cannot agree with the contention that special achivement awards were given as a reward for dropping out of PATCO. There is no evidence that Respondent knew who dropped out of PATCO when the awards were given. There is evidence that many of the awards were initiated before the individuals concerned dropped out, and some were actually presented to employees at a time that they were members.

Turning now to Stephens' personal problems, there is no basis for me to conclude that the systems error was called on Stephens because of his PATCO affiliation. It was reported to management that Stephens failed to allow the proper FAA Handbook separation for departing and landing aircrafts. Johnson followed the established procedure for calling a board of review, the purpose of which was to ascertain if the error occurred, and methods of prevention in the future. There is no disciplinary action taken against a controller guilty of an error. While there is evidence that two members of the Board of Review were reluctant to make a decision and one testified at the hearing herein that he did not think there was an error, the supervisory member of the review board did and signed the report of the inquiry. It is inconceivable that the supervisory member found as he did because of Stephens' PATCO affiliation, especially where witnesses of the incident reported that there was an inadequate separation.

12/ Professional Air Traffic Controllers Organization, Inc., A/SLMR No. 10.

13/ I credit Johnson's version of his conversations with his employees that he suggested that they disassociate from irresponsible leadership at PATCO and that he did not suggest that they leave PATCO. It is understandable how some employees might conclude from his statements that he was suggesting they drop out of PATCO.

Stephens had many arguments with Johnson and other supervisors as to FAA procedures, methods of promotion, and supervision. He heatedly accused Johnson of throttling his promotion to Austin in June 1969, and complained that there were things in his file which prevented his promotions. He argued with Johnson and other supervisors over the simultaneous landing issue and refused orders to follow procedures desired by supervisors. He often complained to fellow employees about the work, supervision and policies of management. Stephens had the same problems with supervisors and employees at Hot Springs before he came to Hobby and before any issue of PATCO membership was in the picture.

The poor appraisal rating he received in August 1969, cannot be attributed to his membership in PATCO. An appraisal is a subjective evaluation of a supervisor. It is not in my purview to determine whether the appraisal was too harsh, and there is no evidence which could lead to the conclusion that the supervisor who prepared the appraisal was influenced by Stephens' PATCO affiliation rather than by Stephens' performance and attitude between June 1969, and the date of the appraisal. Significantly, when Stephens complained to Johnson about this rating, Johnson promised to watch Stephens' performance and have his supervisors also watch his performance with a view toward giving him a special appraisal in 90 days if he improved. Consequently, an up-graded appraisal was given Stephens in January 1970. Such action is inconsistent with the contention that Johnson was discriminating against Stephens because of his union activity and was attempting to keep Stephens from obtaining a promotion. 14/

Finally, we came to the sole issue before me for determination, whether Stephens' non-selection on his June 1970, Austin bid was violative of Section 19(a)(2) of the Order. Apparently Stephens' only basis for justifying his selection over those selected was his seniority. But seniority at the FAA is not dispositive. Further, his experience at a level II facility such as Hobby, the level below the Austin facility, was not extensive (for example, it was no greater than that of the two employees from Hobby who were selected). While Stephens had bid twice for a job at Austin and had been turned down, repetitive bids are not extradordinary in the FAA. One of the successful applicants on the bid in issue, had bid five times previously for a position at Austin.

The selection of individuals for promotions is in many respects a subjective process on the part of the selecting official. Sherfy and Hagans testified that those selected had better appraisals than Stephens, three had received special achievement awards, and one had an outstanding performance rating.

Admittedly Sherfy had the sole authority to make the selections. There is no evidence that he discussed Stephens' attributes with Johnson or any other official. The record does not establish by a preponderance of the evidence any good reason to discredit Sherfy and Hagans as to their basis for the selections and their assurance that membership in PATCO was no consideration. 15/

In view of the above, I conclude that the Complainant has not met the burden of establishing by a preponderance of the evidence that the failure to select Bobby J. Stephens for a position at Austin was discriminatory with respect to hiring, tenure, promotions, or other conditions of employment in order to encourage or discourage membership in a labor organization within the meaning of Section 19(a)(2) of the Order.

RECOMMENDATION

Upon the basis of the foregoing findings and conclusions it is recommended that the complaint against Respondent, Department of Transportation, Federal Aviation Administration, Houston area office, Southwest Region, Houston, Texas, be dismissed in its entirety.

Dated at Washington, D.C.
September 21 , 1971

Henry L. Segal
Hearing Examiner

14/ In fact there is evidence in the record that Johnson selected some personnel for Hobby with knowledge that they were members of PATCO, and that personnel from Hobby were promoted while they were members.

15/ As noted above one of the selectees was a member of PATCO and a Facility Director for PATCO at Chattanooga and one other may have been a member of PATCO.

January 25, 1972

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

NAVAL UNDERWATER SYSTEMS CENTER,
NEWPORT LABORATORY,
NEWPORT, RHODE ISLAND
A/SLMR No. 127

This case involves a representation petition filed on July 16, 1971, by the National Association of Government Employees, Local R1-134 (NAGE), for a unit of all Wage Board employees of the Activity. The Intervenor, Lodge 119, International Association of Machinists and Aerospace Workers, AFL-CIO (IAM), which currently is the exclusive representative of the claimed employees, and the Activity asserted that the petition filed by NAGE was filed untimely.

The Activity and the IAM were parties to a negotiated agreement which expired on April 20, 1971. On February 22, 1971, NAGE filed a representation petition seeking an election in the unit represented by the IAM. The NAGE's petition was dismissed as untimely by the Regional Administrator on March 16, 1971. The dismissal was appealed to the Assistant Secretary who, on May 27, 1971, upheld the Regional Administrator's action. The Activity and the IAM had refrained from bargaining pending resolution of the appeal but, subsequent to the Assistant Secretary's action, they entered into negotiations. During these negotiations, the NAGE filed a second petition for the same unit. Thereafter, despite the pendency of the NAGE's second petition, the IAM and the Activity executed a collective bargaining agreement.

The Activity and IAM contend that the second NAGE petition was untimely because under Section 202.3(d) of the Assistant Secretary's Regulations, after the dismissal of the NAGE's first petition they should have been afforded a ninety (90) day period free from rival claim within which to consummate an agreement and the second NAGE petition came within that ninety (90) day period.

The Assistant Secretary found that the second petition filed by NAGE was timely. He noted that the ninety (90) day period prescribed in Section 202.3(d) of the Regulations is granted only upon the withdrawal or dismissal of a petition filed not more than ninety (90) and not less than sixty (60) days prior to the terminal date of an agreement. Because the original NAGE petition was not filed in the ninety (90) to sixty (60) day period, the Regulation cited by the Activity and the IAM was found to be inapplicable. Accordingly, as the Assistant Secretary found there was no bar to the processing of the petition of the NAGE, he directed an election in the claimed unit which he found to be appropriate.

A/SLMR NO.127

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NAVAL UNDERWATER SYSTEMS CENTER,
NEWPORT LABORATORY
NEWPORT, RHODE ISLAND 1/

Activity

and Case No. 31-5222(EO)

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R1-134

Petitioner

and

LODGE 119, INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Thomas W. Campbell. 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 parties' briefs, the Assistant Secretary finds:

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

2. Petitioner, the National Association of Government Employees, Local R1-134, herein called NAGE, seeks an election in a unit of all Wage Board employees of the Activity. The parties are in agreement as to the appropriateness of the claimed unit.

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

The Activity and the Intervenor, Lodge 119, International Association of Machinists and Aerospace Workers, AFL-CIO, herein called IAM, have a collective bargaining history with respect to the claimed unit which commenced in 1963. In 1969, the Activity and the IAM entered into a two year agreement which was to expire on April 20, 1971. On January 4, 1971, the IAM notified the Activity of its desire to begin negotiating for a new agreement. By letter dated January 19, 1971, the Activity declined to begin negotiations, suggesting that negotiations not commence until after the expiration of the ninety (90) to sixty (60) day challenge period. On February 22, 1971, the NAGE filed a petition in Case No. 31-4388(EO) seeking an election in the unit represented by the IAM. Thereafter, the Activity advised the IAM that "because of this challenge /by the NAGE/ it would not be permissable to proceed with the negotiation process at this time."

The Regional Administrator dismissed the NAGE's petition on March 16, 1971, as being untimely, based on the view that because the Activity-IAM agreement had an expiration date of April 20, 1971, a petition, to be filed timely, would have been filed no later than February 19, 1971, inasmuch as February 20, 1971, the sixtieth day prior to the terminal date of the agreement, fell on a Saturday. On March 26, 1971, the NAGE appealed the dismissal of its petition to the Assistant Secretary, contending that in the circumstances its petition should have been considered timely.

On May 27, 1971, the Assistant Secretary denied the NAGE's appeal. By letter to the Activity dated June 7, 1971, the IAM sought to commence negotiations, and on June 17, 1971, negotiations began. Thereafter, on July 16, 1971, the NAGE filed its representation petition in the subject case. Despite the pendency of the NAGE's petition, an agreement was executed by the Activity and the IAM on August 6, 1971, and submitted to the Activity's Office of Civilian Manpower Management on August 16, 1971.

The Activity and the IAM contend that, consistent with the Assistant Secretary's Regulations, for a period of ninety (90) days subsequent to the dismissal of its first petition, the NAGE was precluded from filing a second petition and that, therefore, the NAGE's July 16, 1971 petition, filed within ninety (90) days of the Assistant Secretary's action on its first petition, should be dismissed as untimely. In support of this contention, they rely on Section 202.3(d) of the Assistant Secretary's Regulations, which provides for a ninety (90) day period for an incumbent exclusive representative and an Activity to consummate an agreement free from rival claim upon the dismissal

or withdrawal of a timely challenge. 2/ On the other hand, the NAGE contends its July 16, 1971 petition was timely inasmuch as there was neither an agreement nor a ninety (90) day period free from rival claim in effect at the time of filing. In this regard, the NAGE notes that the provisions of Section 202.3(d) of the Regulations, relied upon by the IAM and the Activity, are not applicable in this situation because its earlier petition was not timely filed and that Section expressly applies only to petitions filed within the ninety (90) to sixty (60) day challenge period.

Based on the foregoing, I find that there is no bar to the processing of the NAGE's petition in the subject case. Thus, it is undisputed that there was no agreement in effect at the time of filing of the petition. In addition, it is clear that the ninety (90) day period provided for under Section 202.3(d) is applicable only upon the withdrawal or dismissal of a petition "filed not more than ninety (90) days and not less than sixty (60) days prior to the terminal date of an agreement..." Therefore, inasmuch as the original NAGE petition was not filed during the prescribed ninety (90) to sixty (60) day period, I find that the Activity and the IAM were not entitled to a ninety (90) day period free from rival claim within which to consummate an agreement after the dismissal of the NAGE's initial petition and that, therefore, the NAGE's petition in the subject case was filed timely. In these circumstances, I shall direct an election in the petitioned for unit. 3/

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

> All Wage Board employees of the Naval Underwater Systems Center, Newport Laboratory, Newport, Rhode Island, excluding all General Schedule employees, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

2/ Section 202.3(d) states: "When a challenge to the representation status of an incumbent exclusive representative has been filed not more than ninety (90) days and not less than sixty (60) days prior to the terminal date of an agreement, and such challenge is subsequently dismissed or withdrawn, the Activity and incumbent exclusive representative shall be afforded a ninety (90) day period free from rival claim within which to consummate an agreement."

3/ The evidence reveals that all General Schedule employees of the Activity currently are represented by the NAGE in a separate unit.

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 45 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are all 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 furlough including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the National Association of Government Employees, Local R1-134; or by Lodge 119, International Association of Machinists and Aerospace Workers, AFL-CIO; or by neither.

Dated, Washington, D.C.
January 25, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

January 28, 1972

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

DEPARTMENT OF THE NAVY,
UNITED STATES NAVAL WEAPONS CENTER,
CHINA LAKE, CALIFORNIA
A/SLMR No. 128

This case involved a unit clarification petition filed by the International Association of Fire Fighters, Local F-32, AFL-CIO, (IAFF) seeking clarification of the status of two employee classifications located in an exclusive bargaining unit at the United States Naval Weapons Center, China Lake, California. Contrary to the view of the IAFF, the Activity contended that the disputed classifications should be excluded as supervisory.

With respect to the Fire Captains, GS-7, the Assistant Secretary found that they were not "supervisors" within the meaning of Executive Order 11491 and that this classification should be included in the unit. In this respect, he found that all of the Fire Captains' actions were subject to the close scrutiny and review of their immediate supervisors, the Assistant Chiefs. In addition, he noted that established practices, written procedures and regulations further restricted the Captains' exercise of independent authority and that while the Captains have some functions and responsibilities that set them apart from other Firefighters, any authority vested in them was of a routine or clerical nature not requiring the use of independent judgment. Moreover, he noted that Captains have no authority to hire, discharge, or lay off employees, have little control over assignments and in fire emergencies their actions were controlled by established routinized procedures dictated by the exigencies of the situation. With respect to personnel evaluations, the Assistant Secretary noted that while the Captains have evaluation and recommendation functions, they do not make "effective" recommendations in that there are always higher layers of review for all important evaluations.

With respect to the Fire Protection Inspector, GS-7, the Assistant Secretary noted that the GS-7 Fire Protection Inspector spent a substantial portion of his work time performing duties similar to those of the GS-6 Fire Protection Inspector who was included in the unit; that the GS-7 Inspector's authority was generally of a routine or clerical nature not requiring the use of independent judgment; and that he did not make effective recommendations with regard to personnel actions. Moreover, he noted that the authority exercised by the GS-7 Fire Protection Inspector was limited to one employee. Accordingly, the Assistant Secretary found that the employee in this classification was not a supervisor and, therefore, should be included in the unit.

A/SLMR No. 128

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
UNITED STATES NAVAL WEAPONS CENTER,
CHINA LAKE, CALIFORNIA

Activity

and

Case No. 72-2238(CU)

INTERNATIONAL ASSOCIATION OF FIRE
FIGHTERS, LOCAL F-32, AFL-CIO,
RIDGECREST, CALIFORNIA

Petitioner

DECISION AND ORDER CLARIFYING UNIT

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

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

The International Association of Fire Fighters, Local F-32, AFL-CIO, herein called IAFF, is the exclusive representative of certain employees of the Activity. In this proceeding, it seeks to clarify the status of 2 employee classifications, (Fire Captain, GS-7 and Fire Protection Inspector, GS-7), requesting that they be included in its exclusively recognized unit located at the U. S. Naval Weapons Center, China Lake, California. The Activity contends that the employees in each of the disputed classifications are supervisors within the meaning of Section 2(c) of the Order and that, therefore, they should be excluded from the exclusively recognized unit.

Historically, the IAFF has represented all Firefighters of the Fire Division of the Naval Weapons Center, excluding the Fire Chief, Deputy Chief, Assistant Chiefs, and Fire Protection Inspectors, GS-7 and GS-8. Subsequent to the 1970 renegotiation of the parties' collective bargaining agreement, the Activity unilaterally removed Fire Captains, GS-7 from the unit on the ground that they were supervisors within the meaning of Section 2(c) of the Executive Order. The IAFF contends that neither the Fire Captains, GS-7, nor the Fire Protection Inspector, GS-7 1/, are supervisors within the meaning and intent of the Executive Order.

As an alternative position, the IAFF urges that in the event the Assistant Secretary finds that the Fire Captains and Fire Protection Inspector, GS-7, are supervisors, they should still be given the opportunity to select the IAFF as their bargaining representative pursuant to the provisions of Section 24(a)(2) of the Executive Order. The Activity contends that Section 24(a)(2) is inapplicable to the facts of the subject case.

The Naval Weapons Center at China Lake, California, is engaged in the research, manufacture, testing and storage of explosives and weaponry. The Fire Division, a component of the Security Department of the Naval Weapons Center, is responsible for all the fire protection at the Center.

The Fire Division at the Naval Weapons Center has a total complement of approximately 95 persons. The Division is headed by a Fire Chief (GS-11). The Deputy Chief (GS-9) is his administrative aide. Working under the Chief are 2 Assistant Fire Chiefs (GS-9), 1 Fire Protection Inspector (GS-8),6 Fire Captains (GS-7), 1 Fire Protection Inspector (GS-7), 1 Fire Protection Inspector (GS-6), 14 Crew Chiefs (GS-6), 12 Driver Operators (GS-5), 48 Firefighters (GS-5 and GS-4) and 8 trainees (GS-3). The Fire Protection Inspectors, GS-6 and GS-7, are under the direct supervision of the Fire Protection Inspector,(GS-8).

The fire fighting personnel are divided into two shifts -- one shift is on duty for 24 hours while the other is off-duty, and vice versa. On these shifts are the Assistant Chiefs, Captains, Crew Chiefs, Driver Operators and Firefighters. The Chief works four 8-hour days and one 24-hour shift, for a total of 56 hours per week. The Fire Protection Inspectors work five 8-hour days, for a total of 40 hours per week.

The Firefighters are each assigned to one of three fire stations 2/. Fire Station No. 1 is directly responsible for the fire protection of the housing area at the Naval Weapons Center and the China Lake Propulsion Laboratory. Its equipment consists of two pumpers and a rescue

1/ The record revealed that the Fire Protection Inspector, GS-7 classification has never been included in the exclusively recognized unit. At the hearing, the IAFF indicated that it also sought clarification with respect to this classification.

2/ Fire Stations Nos. 1, 3 or 4. There is no Station No. 2.

vehicle. In the station itself, there is a large dormitory in which each fire fighting employee, including the Captain, has a bed and locker. There is also a lavatory and shower, as well as a recreation room and galley which are used by all employees. The Captain's desk is situated in a large open area which houses the fire fighting equipment. A separate office, partitioned off from the rest of the station, is for the exclusive use of the Fire Chief, his Secretary, the Deputy Chief, the Assistant Chiefs and the Fire Protection Inspector, GS-8. Outside of Station No. 1 is a small building containing the quarters for the Assistant Chief. This building also is used as a rest area by the Fire Chief when he is on duty. The fire fighting complement for each shift at Station No. 1 consists of 1 house Captain, two Crew Chiefs, 13 Firefighters and a Fire Communications Operator.

Fire Station No. 3 is a combination structural and crash firehouse which covers part of the range areas and handles both aircraft and structural emergencies at the Naval Air Facility. Station No. 3's equipment consists of one pumper, one pickup truck, 2 MB-1 Foam Crash Trucks and a cardox crash truck. The fire fighting complement consists of 2 Captains, 5 Crew chiefs, and 16 Firefighters. One Captain at Station No. 3 is designated as Structural Captain, responsible for structural fire emergencies, while the second Captain is designated as Crash Captain, responsible for emergencies involving aircraft. In the station itself, there is a large dormitory in which each employee has his bed and locker. The main floor also has a dining and galley area and a lavatory used by all employees. On the second floor, above the area which houses the fire fighting vehicles and equipment, is a recreation room, a lavatory and shower used by all employees. In a partitioned area of the room housing the equipment and vehicles, there are two desks used by the Captains as well as other employees who have a need therefor.

Fire Station No. 4 is in a classified area located approximately 25 miles from Station No. 1. Only one Firefighter, a GS-5 Driver Operator is assigned to this station. In the event of a fire emergency, Fire Station No. 1 responds with assistance.

The Fire Chief is both the administrative and the technical head of the Fire Division. As the shift supervisor, the Assistant Chief on duty is responsible for the efficient operation and management of the fire stations. The Assistant Chief prepares a daily duty roster listing all personnel available. He has the authority to transfer employees from one station to another and may overrule the actions of the Captains with respect to employee transfers. The Assistant Chief visits each station twice daily and responds to all fire alarms, if possible. At a fire emergency, he is usually the superior officer present and all decisions are subject to his review.

Fire Captain (GS-7)

Fire Captains are in charge of a fire station or a portion of its operation. 3/ In directing their respective fire companies, they are responsible for effectuating all fire prevention and protection policies. With respect to job assignments, the record reveals that annually, each Firefighter is given the opportunity, according to seniority, to pick his station assignment and his weekly day off. Once the station and crews are established, apparatus assignments are essentially fixed. However, the Captains may shift their personnel on a daily basis to balance manpower needs. The record reflects also that odd jobs are either rotated by schedules or equitably assigned by the Captains.

The evidence discloses that overtime assignments are distributed equally and are limited to unforeseen and emergency situations. In addition, the Commanding Officer at a fire emergency may call in individuals with specialized skills, i.e., electrician, plumber, as the situation warrants.

In responding to fire emergencies, the fire fighting companies react in accordance with published "running" schedules in the majority of cases. These schedules indicate the apparatus that is to respond to alarms in various locations and the backup emergency operations to be utilized at each fire station. When responding to an impending crash alarm, the Crew Chiefs 4/ place their apparatus and crews at predetermined runway standby points.

The Captains involved in a fire emergency accompany their vehicles to the site of the alarm, generally along prearranged routes. The evidence reflects that the Captains' duty at a fire emergency is essentially to oversee operations before the Assistant Chief arrives. In this regard, the record also reveals that the Firefighters are trained and experienced in performing their assignments and that published regulations and manuals determine their actions. Moreover, decisions at a fire emergency are most often dictated by the exigencies of the situation, and leave little room for individual discretionary judgments.

The evidence discloses that Captains may suspend an employee for up to one hour for an infraction such as drunkenness, or they may

3/ As noted above, there is a Captain in charge of Station No. 1 and Structural and Crash Captains in charge of Station No. 3.

4/ The GS-6 Crew Chiefs are each in charge of a particular fire fighting vehicle and are the immediate superior officers for the 3-5 Firefighters assigned to their piece of apparatus.

recommend more severe discipline subject to the review of the Chief or the Assistant Chief. Captains also participate in the handling of employee grievances at the first discussion level where they attempt to reconcile employee dissatisfactions. If the employee is not satisfied with the decision made by the Captain, he may then file a formal grievance with the Fire Chief. In this connection, the evidence establishes that the Captains have never resolved any formal grievances. The training of the Firefighters is conducted primarily by the Crew Chiefs, GS-6, and sometimes by the Firefighters, GS-5 and GS-4. Captains take no part in preparing the training program and generally are not present at the training sessions.

With respect to personnel evaluations, the record reveals that all personnel at or above the GS-6 level are responsible for appraising the performance of subordinates and such appraisals are reviewed by the Assistant Chief and the Chief. The evidence discloses that the Captains, as well as other employees having evaluation responsibilities, routinely certify that the performance of newly hired employees is satisfactory which assures that they can be retained subsequent to the probationary periods. In addition, in-grade step increases are approved routinely each year for the Firefighters and the Personnel Services Division of the Security Department automatically institutes the salary increases. Further, the evidence establishes that recommendations for quality step increases can be initiated by any Firefighter, GS-6 or above, and that these recommendations are passed upward through the chain of command for each superior officer's personal comments and signature. The recommendations are then passed to the quality step increase panel 5/ for a final review and decision. This panel is composed of the Fire Chief and other division heads of the Naval Weapons Center.

With respect to grade level promotions, the evidence shows that promotions from the GS-3 to the GS-4 level generally are automatic. Candidates for promotion to the GS-5 level and above are subject to a practical performance test and an oral interview which together account for 80 percent of their evaluation. While the record reveals that an evaluation of potential performance for each applicant is prepared by a superior officer, such as a Fire Captain, the evidence establishes that performance appraisals constitute 10 percent or less of the total evaluation of candidates for promotion.

Based on the foregoing, I find that the employees herein classified as Fire Captains are not supervisors within the meaning of Section 2(c) of the Order. Thus, the evidence establishes that their influence over the job assignments of Firefighters is minimal and that their activities are supervised closely by the Assistant Chief who visits each station at least twice daily. Further, in fire emergencies the response of each station is largely determined by routinized procedures in accordance with published schedules and manuals with the Assistant Chief generally in overall command of all fire fighting.

5/ A component of the Personnel Services Division of the Security Department.

With respect to working conditions, it is clear that Captains not only interact continually with other Firefighters, but also share all living facilities with them. While the evidence indicates that Captains have some functions and responsibilities which distinguish them from other Firefighters, the authority vested in the Captains generally is of a routine or clerical nature not requiring the use of independent judgment. Thus, the Captains clearly have no authority to hire, discharge, or lay off employees and the extent of their capacity to discipline employees is limited to one hour suspensions for infractions which mandate automatic punishment. As to the Captains' role in the grievance procedure, they have no authority to resolve formal grievances and their decisions as a result of preliminary discussions with aggrieved employees are not determinative, but are subject to multiple levels of appeal.

With respect to personnel evaluations, the evidence does not establish that Captains have the authority "effectively to recommend" personnel action. In this regard, in-grade step increases are automatically approved each year and the Captains' recommendations regarding quality salary increases are subject to at least two levels of review before final scrutiny by a panel of the Security Department. Moreover, it appears that the Captains' performance evaluations for probationary employees are completed routinely and that performance appraisals for employees seeking promotion have minimal importance in the evaluation of these employees.

In these circumstances, and noting also that Captains have historically been included in the unit involved herein and covered by negotiated agreements under Executive Order 10988, I find that the employees classified as Fire Captain (GS-7) are not supervisors within the meaning of the Order and should be included in the unit. 6/

6/ Inasmuch as I have concluded that the Fire Captains, GS-7, are not supervisors within the meaning of Section 2(c) of the Executive Order, it was considered unnecessary to decide the IAFF's alternative theory concerning the application of Section 24(a)(2) of the Executive Order. However, it should be noted that Section 24(a)(2) by its terms refers to units of supervisors rather than to the mixing of supervisors in units appropriate pursuant to Section 10 of the Order. Moreover, the Study Committee's Report and Recommendations on Labor-Management Relations in the Federal Service, the "legislative history" of the Executive Order, also indicates that Section 24(a)(2) refers to supervisors being represented in separate units by labor organizations which traditionally represent such supervisors in the private sector. In this regard, see United States Department of the Navy, United States Naval Weapons Station, Yorktown, Virginia, A/SLMR No. 30.

The evidence establishes that the employee in this job classification is responsible for making continuous inspections of buildings, their contents, utilities and surrounding areas. In this regard, all routine inspections, personnel instructions and local correction of fire hazards are carried out within detailed instructions and guidelines.

All three Fire Protection Inspectors, GS-8, GS-7, and GS-6, are under the direct command of the Fire Chief. The evidence establishes that they occupy positions outside of the authority structure of the Firefighters. While the GS-7 Inspector may instruct the GS-6 Inspector regarding his inspection area and the type and frequency of inspection, it is the Fire Protection Inspector, GS-8 who makes assignments and supervises the activities of both the GS-7 and GS-6 Inspectors. The record also reveals that the GS-8 Inspectors fill out personnel evaluations for both the GS-7 and the GS-6 Inspectors and that the GS-7 Inspector can recommend personnel actions, which are subject to review by the GS-8 inspector.

Based on the foregoing,I find that an employee classified as a Fire Protection Inspector (GS-7) is not a supervisor within the meaning of the Order and, therefore, should be included in the unit. In this regard, it is clear that the duties of an employee in this classification generally do not require the use of independent judgment; that a substantial portion of his work time involves the same duties as are performed by the GS-6 Fire Protection Inspector who is in the unit and that a GS-7 Fire Protection Inspector does not make effective recommendations with respect to personnel actions. Moreover, the evidence establishes that the authority exercised by the GS-7 Fire Protection Inspector is limited to one employee. 7/

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein in which exclusive recognition was granted on February 6, 1963 to International Association of Fire Fighters, Local F-32, AFL-CIO, located at the United States Naval Weapons Center, China Lake, California, be, and hereby is, clarified by including in the said unit the employee classifications Fire Captain, GS-7 and Fire Protection Inspector, GS-7.

Dated, Washington, D.C.
January 28, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

7/ See United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, A/SLMR No. 120.

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

DEPARTMENT OF THE NAVY,
MARE ISLAND NAVAL SHIPYARD
A/SLMR No. 129

This case involved a unit clarification petition filed by the International Association of Firefighters, AFL-CIO, Local F-48 (IAFF), seeking clarification of the status of two categories of employees located in an exclusive bargaining unit at Mare Island Naval Shipyard, Vallejo, California. Contrary to the view of the IAFF, the Activity contended that Supervisory Firefighter (Structural), GS-081-7, and Supervisory Firefighter (Structural), GS-081-6 classifications should be excluded as supervisory.

The Assistant Secretary found that employees in both disputed classifications were not "supervisors" within the meaning of Executive Order 11491, and that such classifications, therefore, should be included in the unit. In this respect, he noted, among other things, that they had no authority to hire, permanently transfer, suspend, lay off, recall, promote or discharge employees, and that they followed rotational rosters in making work assignments. Moreover, they cannot dispose of formal grievances and their preparation of annual performance appraisals was routine and perfunctory.

A/SLMR No. 129

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. 70-1876

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS,
AFL-CIO, LOCAL F-48
VALLEJO, CALIFORNIA

Petitioner

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Carol A. Philipps. 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 parties' briefs, the Assistant Secretary finds:

The Petitioner, International Association of Fire Fighters, AFL-CIO, Local F-48, herein called IAFF, is the exclusive representative of certain employees of the Activity. 1/ In this proceeding, it seeks to clarify the status of 2 employee classifications (Supervisory Fire Fighter Structural, GS-7 and Supervisory Fire Fighter Structural, GS-6) requesting that they be included in its exclusively recognized unit located at Mare Island Naval Shipyard, Vallejo, California. The Activity contends that the employees in each of the disputed classifications are supervisors within the meaning of Section 2(c) of the Order and that, therefore, they should be excluded from the exclusively recognized unit. As an alternative, the IAFF urges that, in the event the Assistant Secretary finds that the individuals in the disputed classifications are supervisors, they should still be given the opportunity to select the IAFF as their bargaining representative pursuant to the provisions of Section 24(a)(2) of the Executive Order.

The Mare Island Naval Shipyard complex is four miles long and one and one-half miles wide and contains dry docks, building ways, loading piers, schools, operations centers, reserve fleet ships, and numerous tenant and satellite commands. The Activity provides support for assigned ships and service craft, including nuclear vessels, performing authorized work in connection with construction, conversion, overhaul, repair, alteration, dry docking, and outfitting of ships and craft. The industrial portion of Mare Island contains approximately 900 combustible buildings, relatively few of which are equipped with sprinkling systems. Operations such as welding, lead burning, painting, annealing, ship refueling, industrial testing with radioactive materials, ammunition, and explosives handling, etc., continually present a high degree of fire expectancy and severity. In this connection, the Fire Branch, a component of the Security Division, is responsible for all fire protection at the Activity.

Fire Branch personnel are based at three fire stations -- Central Fire Station, South Fire Station, and North Fire Station -- located about one mile apart from each other. The Fire Branch is headed by a Fire Chief, GS-11. Reporting directly to him are two Assistant Fire Chiefs, GS-9, and one Fire Prevention Chief, GS-8 (chief fire inspector). 2/ In addition, the fire fighting complement includes: two Senior (Shift) Captains, GS-7; six Station Captains, GS-6; ten Driver Operators, GS-5; thirty Hosemen, GS-4, two Alarm Operators, GS-4; and five Fire Protection Inspectors, GS-7. The Chief works a 56-hour week -- four eight-hour days and one 24-hour shift. The Fire Inspectors work a 40-hour week and all other personnel work a 72-hour week -- three shifts; 24 hours on; 24 hours off.

The Chief, the two Assistant Chiefs, and the Chief Inspector have offices in "building 235", adjacent to Central Station. The Chief visits North and South Stations at least once a week and visits Central Station

1/ The IAFF was granted exclusive recognition on March 23, 1964.

2/ These individuals are excluded from the existing exclusively recognized unit.

considerably more often. The Assistant Chiefs, who are also designated "Shift Supervisors," visit North and South Stations anywhere from two or three times a day to once a week. The Chief and the Assistant Chief sleep at Central Station on their 24-hour duty shifts.

DISPUTED JOB CLASSIFICATIONS

Supervisory Fire Fighter (Structural) (GS-6) and Supervisory Fire Fighter (Structural)(GS-7) 3/

When answering alarms, a chain of command is followed in directing the activities of Fire Branch personnel. The Assistant Chief on duty answers all but a small percentage of fires occurring on his duty watch. When he arrives at a fire, he takes over from the Captain in charge, and the attack of the Firefighters on the fire is subject to his review and revision.

In effectuating work assignments in the stations, the Captains follow an established rotation system. Similarly, positions on equipment, housekeeping chores and regular maintenance are all routinized by the use of rosters.

The uniforms of the Chief and the Assistant Chiefs are distinguished from the other personnel by white hats and white shirts. Captains, who wear blue hats and blue shirts, are distinguished from the other Firefighters only by their badges which are inscribed with the word "CAPTAIN," while Driver Operators and Hosemen alike are designated "MEMBER" of the Fire Branch by the inscription on their badges. Captains have sleeping rooms, separate from the dormitory arrangements of the other Firefighters. 4/

One Assistant Chief is the Chief Training Officer. He orders Saturday morning drills, attends and critiques them. While some other training exercises are handled by the Captains, their plans are prepared from published manuals, and the Assistant Chief reviews these formats and makes suggestions. Moreover, some training is also performed by GS-4's and GS-5's, who have special expertise in certain areas.

3/ Both classifications are commonly referred to as "Captains." Senior (Shift) Captains, (GS-7) are distinguished from Station Captains and Company Captains (GS-6) only in that: (1) they may assign approved leave; (2) they have authority to transfer employees for the period of one 24-hour shift; and, (3) they make out reports after fires occur. The Senior Captains are also regarded as higher in the chain of command at a fire. Otherwise the duties of the GS-6 and GS-7 Captains are the same.

4/ At North Station, only the Pumper Captain has this distinction. The Aerial Ladder Captain sleeps in the dormitory room with the others.

The authority of a Captain to discipline extends only to oral reprimands. Captains make written recommendations to their superiors who may, at their discretion, initiate further measures. Formal grievances are required to be submitted to the Assistant Chief in writing. There is no evidence that any formal grievance has ever been filed. Although Captains are designated the first stage of the grievance procedure, the evidence reveals that this consists merely of informal discussions of minor problems and complaints.

Captains are responsible for certain administrative duties involving the completion of various forms. Many of these are routine inspection reports. In this regard, the record discloses that GS-4 and GS-5 level Firefighters perform many of these inspections and have, on occasion, entered data onto forms to which the Captain merely affixed his signature. While the Captains exercise certain independent judgment in issuing weld/burn permits and fire hazard notices and in completing certain test records, the record indicates that this judgment is based on the Captain's greater experience and superior skill, and not on his supervision of personnel. Moreover, the evidence establishes that a Captain's judgment in this respect is subject to review and revision by the Chief and the Assistant Chiefs.

With respect to employee evaluations, the record revealed that one of the Activity's Captains prepared an annual performance rating. However, the evidence shows that the annual rating consisted solely of an oral notification of "satisfactory" performance.

Based on the foregoing, I find that the employees in the disputed job classifications are not supervisors within the meaning of Section 2(c) of the Order. Thus, the record shows that Captains have no authority to hire or discharge or impose formal discipline; make permanent transfers; suspend, lay off, recall, or promote; dispose of formal grievances; and they may not grant leave, except in emergencies. Further, annual performance ratings which are prepared are perfunctory in that employees are always rated "satisfactory" and in effectuating work assignments the Captains follow an established roster system.

In all these circumstances, I find that, while Fire Captains at Mare Island Naval Shipyard may be distinguished from other positions, by certain duties, responsibilities and perquisites, they do not exercise sufficient authority requiring the use of independent judgment, which is necessary to satisfy the Section 2(c) definition of supervisor. I

shall, therefore, order that employees in the disputed classifications be included in the unit. 5/

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, in which exclusive recognition was granted to the International Brotherhood of Firefighters, AFL-CIO, Local F-48, on March 23, 1964, be, and it hereby is, clarified by including in said unit the employee classifications Supervisory Firefighter (Structural), GS-6 and Supervisory Firefighter (Structural), GS-7.

Dated, Washington, D.C.
January 28, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

5/ Inasmuch as I have concluded that the Captains are not supervisors within the meaning of Section 2(c) of the Executive Order, it was considered unnecessary to pass upon the IAFF's alternative theory concerning the application of Section 24(a)(2) of the Executive Order. In this regard, however, see United States Navy Department, United States Naval Weapons Station, Yorktown, Virginia, A/SLMR No. 30; Federal Aviation Administration, Bureau of National Capitol Airports, A/SLMR No. 91; and Department of Navy, United States Naval Weapons Center, China Lake, California, A/SLMR No. 128.

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

UNITED STATES NAVAL AIR STATION,
MOFFET FIELD, CALIFORNIA
A/SLMR No. 130

This case involves a severance request by the International Association of Fire Fighters, AFL-CIO, CLC, Local F-162, (IAFF), for a unit of fire fighters currently represented in an Activity-wide unit by the National Federation of Federal Employees, Local 759, (NFFE). The Intervenor, NFFE, has been the exclusive representative for the requested unit since 1967.

In the circumstances of this case, the Assistant Secretary, applying the policy enunciated in United States Naval Construction Battalion Center, A/SLMR No. 8, denied the severance request and, therefore, dismissed the IAFF's petition. In this regard, he noted the absence of any evidence that the NFFE had failed, in any way, to represent fire fighters fairly and effectively. Thus, the record revealed that fire fighters have served as officers of the NFFE, as well as shop stewards, and that the NFFE had processed a formal grievance on behalf of a fire fighter.

A/SLMR No. 130

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES NAVAL AIR STATION,
MOFFET FIELD, CALIFORNIA 1/

Activity

and

Case No. 70-1882

INTERNATIONAL ASSOCIATION OF FIRE
FIGHTERS, AFL-CIO, CLC, LOCAL F-162 2/

Petitioner

and

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 759

Intervenor

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, 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.

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

2/ The name of the Petitioner appears as amended at the hearing.

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

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

2. The Petitioner, International Association of Fire Fighters, AFL-CIO, CLC, Local F-162, herein called IAFF, seeks to sever all fire fighters, including six Supervisory (General) GS-6 Fire Fighters (Fire Captains), employed at the U. S. Naval Air Station at Moffet Field, California from an Activity-wide unit of employees currently represented on an exclusive basis by the Intervenor, the National Federation of Federal Employees, Local 759, herein called NFFE. 3/

Under Executive Order 10988, the NFFE was granted a formal recognition on June 20, 1962 and exclusive recognition on November 13, 1967. The parties' first negotiated agreement, executed on June 5, 1969, had a two-year duration. On June 4, 1971, this agreement was extended for a period of three months. 4/

The Activity contends that the petitioned for unit is inappropriate because it would fragment an existing unit and would not promote effective dealings and efficiency of agency operations. In this regard, it asserts that the fire fighters have been part of an Activity-wide unit which has had a stable history of labor relations and its bargaining agent has provided proper representation to all of the employees included therein. The Activity also contends that the proposed unit is inappropriate because it would include the six Fire Captains whom the Activity claims are supervisors within the meaning of the Executive Order. The NFFE agrees with the Activity that the petitioned for unit is inappropriate because it would fragment an existing unit.

Located at Sunnyvale, California, the Activity employs a total of 425 civilians in many different capacities. The responsibility for fire fighting ordinarily is divided between the Structural Station and the Crash Division. The Structural Station employs only civilian fire fighters who are charged with responsibility for fighting building fires (as opposed to air crash fires), training and inspections. In this regard, the Activity employs 30 civilian fire fighters, including one Chief and two Assistant Chiefs. Located on the runway, the Crash Division employs only military personnel and is charged with responsibility to fight air crash fires. These active duty military personnel are under the immediate authority of a civilian Fire Captain when performing their duties associated with air crash fires.

3/ The claimed unit description was amended at the hearing.

4/ The evidence reveals that the petition herein was filed timely.

The record shows that the Activity's fire fighters, all of whom wear uniforms, are in a job category separate from other Activity employees and have distinctive job responsibilities, knowledge and skills which require specific and continuous training. While reduction-in-force bidding is Activity-wide and new hires are secured from the Civil Service Commission list of eligibles, there is no evidence of transfer or interchange of fire fighters with other Activity employees without the individual involved undergoing specific training. When on duty, only fire fighters occupy Building No. 15, in which they eat and sleep. Moreover, fire fighters work three 24-hour shifts a week, including holidays and Sundays and, in return, receive a 22 to 25 percent pay differential, which, generally, is not received by other Activity employees.

The record reveals also that, while the parties' most recent agreement contains no special provisions with respect to fire fighters, in the past, fire fighters have served as officers of the NFFE, as well as shop stewards. Moreover, there is evidence of the processing of a formal grievance by the NFFE on behalf of a fire fighter. 5/

Based on the foregoing, I find that the petitioned for unit of fire fighters is inappropriate in the absence of evidence that the NFFE has failed to represent such employees fairly and effectively. As I stated in the United States Naval Construction Battalion Center, A/SLMR No. 8, "where the evidence shows that an established, effective and fair collective bargaining relationship is in existence, a separate unit carved out of the existing unit will not be found appropriate except in unusual circumstances."

Accordingly, and in the absence of any unusual circumstances, I find that the unit sought by the IAFF is inappropriate for the purpose of exclusive recognition. 6/ I shall, therefore, order that its petition be dismissed. 7/

5/ In this regard, there is no record evidence that the NFFE failed to process any other grievances filed by fire fighter employees or, in any way, failed to represent them fairly and effectively.

6/ In the circumstances of this case, the fact that the IAFF is a labor organization which represents employees associated with fire fighting functions was not considered to require a contrary result. Cf. Veterans Administration Center, Togus, Maine, A/SLMR No. 84.

7/ In view of the disposition herein, it was considered unnecessary to decide the eligibility question concerning the six Fire Captains included in the claimed unit.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 70-1882 be, and it hereby is, dismissed.

Dated, Washington, D. C.
January 31, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

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

UNITED STATES DEPARTMENT OF DEFENSE,
UNITED STATES ARMY,
UNITED STATES MATERIAL COMMAND,
RED RIVER ARMY DEPOT
A/SLMR No. 131

The Petitioner, Region 14, Local 52 National Association of Government Employees, (NAGE) sought an election in a unit composed of the Activity's Wage Board employees assigned to jobs in the 5700, 4100 and 6000 job classification series. The Intervenor, Local 750, International Chemical Workers Union, AFL-CIO (ICWU) contested the appropriateness of the proposed unit.

The Assistant Secretary determined that the proposed unit was not appropriate for the purpose of exclusive recognition. The Assistant Secretary noted that notwithstanding the fact that the three groups of employees were part of the same Acticity and worked at the same facilities, such factors were off-set by the substantial differences in their job functions; the lack of common immediate supervision; the lack of transfer or interchange; the almost total lack of work related contacts; differences in job skills; and the fact that each of the groups had been separately represented on an exclusive basis by the ICWU.

The Assistant Secretary found also that encompassed within the unit petitioned for was an appropriate unit of employees assigned to the 4100 job classification series which was comprised of employees who were engaged in a common mission and functions, and who shared common supervision, common skills and common working conditions. In these circumstances, the Assistant Secretary directed an election be held in the 4100 job classification series unit. In addition, because the unit found appropriate was substantially different than that sought initially, the Assistant Secretary directed the Activity to post copies of a Notice of Unit Determination in order to ascertain the existence of any additional intervenors in the unit found appropriate.

Inasmuch as the NAGE did not have the requisite thirty percent showing of interest among the employees in either the 5700 job classification series or the 6000 job classification series, the Assistant Secretary made no findings as to the appropriateness of such units.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF DEFENSE,
UNITED STATES ARMY,
UNITED STATES MATERIAL COMMAND,
RED RIVER ARMY DEPOT

Activity 1/

and Case No. 63-2534(RO)

REGION 14, LOCAL 52,
NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES

Petitioner 2/

and

LOCAL 750, INTERNATIONAL CHEMICAL WORKERS UNION, AFL-CIO

Intervenor 3/

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Hugh B. Price. The Hearing Officer's rulings are free from prejudicial error and are hereby affirmed.

_1/ The name of the Activity appears as amended at the hearing.

_2/ The name of the Petitioner appears as amended at the hearing.

_3/ The name of the Intervenor appears as amended at the hearing.

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, Region 14, Local 52, National Association of Government Employees, herein called NAGE, seeks an election in a unit consisting of all of the Activity's Wage Board employees, assigned to jobs within the 4100, 5700, and 6000 job classification series, excluding management officials, employees engaged in Federal personnel work, except in a purely clerical capacity, guards and supervisors as defined in Executive Order 11491, and employees in other units presently represented under exclusive recognition. The Intervenor, Local 750, International Chemical Workers Union, AFL-CIO, herein called ICWU, which currently represents the petitioned for employees in three separate units based on the above noted job classification series, contends that the community of interest among the employees is limited to each job classification and that a unit which combines the three job classification series is inappropriate. The Activity stated that, in its view, exclusive recognition would be appropriate in either three separate units or a single overall unit.

The Activity covers an area of about 36,000 acres and employs approximately 5,600 civilian employees, two-thirds of whom are classified as Wage Board. It is engaged primarily in storing, maintaining and distributing general supplies for the Armed Forces and its operations are under the direction of a military officer, who is designated as the Depot Commander. The Activity is divided into 9 functional and administrative subdivisions called directorates. Each of the directorates is headed by a directorate chief, who is responsible for a particular facet of the Activity's operations. The directorates are subdivided into divisions which, in turn, are divided into sections. Administrative and supervisory authority flows from the Depot Commander through the directorate chiefs, division chiefs and section supervisors to the employees.

The Activity's Wage Board employees are divided into a number of job classification series, each of which includes a number of related jobs. Thus, with respect to the claimed employees, the 5700 job classification series includes 336 mobile equipment operators who are engaged in operating fork lifts, cranes, crane shovels, road sweepers, tractors, trucks, and similar mobile equipment; the 4100 job classification series includes 100 painters, paint preparation workers, and leadmen who are engaged in painting military equipment such as tanks and motor vehicles; and the 6000 job classification series consists of 22 engineers, brakemen and conductors, who are engaged in operating trains within the area covered by the Activity.

The record reveals that the work stations of the mobile equipment operators and the painters and paint preparation workers are located at a number of sites throughout the facility. While a majority of the mobile equipment operators are assigned to the Directorate for Transportation and Distribution, the Directorate for Maintenance, and the Directorate for Services, and a majority of the painters and paint preparation workers are assigned to the Directorate for Maintenance, the evidence establishes that certain employees from both job classification series are assigned to other directorates, as their assignments depend upon where their services are needed rather than upon the Activity's administrative structure. Moreover, the locations at which the mobile equipment operators, painters and paint preparation workers work normally are shared by employees in other job classifications who are not involved herein. 4/

The evidence establishes also that the employees in the claimed unit in different job classification series, e.g., painters, mobile equipment operators and train crewmen--do not share common skills and that, normally, the train crewmen do not have any work related contacts with either the painters or mobile equipment operators. While some of the painters and the mobile equipment operators work in common locations they work independently of each other, and they do not form common work crews. Also, while some employees assigned to the three groups share supervision at the directorate and division levels, they do not share common immediate supervision. Although the employees in the three job classification series in question have access to the same facilities such as lunch rooms, rest rooms, and parking lots and at times may share such facilities, the record reveals that such sharing of facilities depends upon the location of the work stations involved and not upon the assigned jobs. Moreover, other employees of the Activity not covered by the NAGE's petition share these same facilities.

4/ All of the train crewmen are assigned to the Directorate for Transportation and Distribution and they spend substantially all of their work time aboard trains apart from the Activity's other employees.

The history of bargaining on an exclusive basis involving the employees sought in the claimed unit commenced on or about July 23, 1964, at which time the Activity extended the ICWU exclusive recognition for a group of mobile equipment operators in the 5700 job classification series. This bargaining unit was amended on February 12, 1968, to include all employees in the 5700 job classifications series. On November 27, 1967, the ICWU was accorded exclusive recognition covering the employees in the 4100 job classification series and on or about April 29, 1968, it was accorded exclusive recognition for the employees in the 6000 series. In 1964, the Activity and the ICWU entered into a negotiated agreement covering the employees in the 5700 job classification series. Thereafter, a succession of agreements were negotiated covering such employees. On February 19, 1969, the parties' most recent agreement was executed. It covered employees in the three job classification series sought by the NAGE. In this latter regard, the record reveals that during the negotiations which resulted in the parties' most recent agreement the ICWU and the Activity first negotiated separate agreements for each of the three job classification series, and that subsequent to the negotiation of the three agreements, they were combined into a single agreement by officials of the Activity and the ICWU at the national level. The evidence establishes that at the time the agreements were combined, the Activity and the ICWU agreed that, despite being covered under one agreement, the three separately recognized units would remain separate and there is no evidence that this position changed or that the parties, at any time, intended to merge the units. 5/

Based on the foregoing, I find that a single unit encompassing employees in the 5700, 4100 and 6000 job classification series is not appropriate for the purpose of exclusive recognition. While some of the employees in the three job series work at common locations and have common supervision at the directorate and division levels, the evidence establishes that the claimed employees have a substantial variance in job functions; do not have common immediate supervision; do not transfer or interchange; do not form common work crews; and normally have no job contacts. In addition, the employees in the three job classification series covered by the petition herein have been represented in the past in three

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5/ The evidence reveals that the petition in the subject case was filed timely.

separate units, and the evidence establishes that such units have retained their separate identities. In these circumstances, I find that the employees in the unit sought by the NAGE do not possess a clear and identifiable community of interest. Moreover, I find that the claimed unit will not necessarily promote effective dealings particularly where, as here, the history of successful bargaining covering separate units, discussed above, indicates that there have been effective dealings on that basis.

I find further that encompassed within the petitioned for unit is an appropriate unit comprised of the Activity's Wage Board employees in the 4100 job classification series. 6/ Thus, the evidence establishes that such employees have a common mission and common skills, and that they share common immediate supervision and working conditions and do not interchange with any other employees of the Activity. Also, as noted above, the evidence establishes that the employees in the 4100 job classification series have been represented separately on an exclusive basis since 1967.

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

> All Wage Board employees, including leaders, helpers, and apprentices, assigned to jobs in the 4100 job classification series at the United States Material Command, Red River Army Depot, excluding employees in other units presently represented under exclusive recognition, General Schedule employees, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order. 7/

6/ As I have been advised administratively that the NAGE has not submitted to the appropriate Area Administrator the required thirty percent showing of interest which would warrant an election at this time in either a unit of the Activity's 5700 series employees or a unit of its 6000 series employees, I find it unnecessary to determine the appropriateness of such units for the purpose of exclusive recognition.

7/ I am advised administratively that the NAGE has submitted a showing of interest which is in excess of thirty percent of the unit found appropriate. If the NAGE does not wish to proceed to an election in the unit found appropriate, I shall permit it to withdraw its petition upon notice to the appropriate Area Administrator within 10 days of the issuance of this Decision.

DIRECTION OF ELECTION

In the circumstances set forth below, an election by secret ballot shall be conducted among the employees in the unit found appropriate not later than 45 days from the date upon which the appropriate Area Administrator issues his determination with respect to any intervention in this matter. The appropriate Area Administrator shall supervise the 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 quit or were discharged for cause since the designated payroll period and were not 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 Region 14, Local 52, National Association of Government Employees; or Local 750, International Chemical Workers Union, AFL-CIO; or by any other labor organization which, as discussed below, intervenes in this preceeding on a timely basis.

Inasmuch as the unit found appropriate is substantially different from that which was petitioned for, I direct that the Activity post copies of a Notice of Unit Determination, as soon as possible, in places where notices are normally posted affecting the employees in the unit I have 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 intervention, otherwise timely, will be granted solely for the purpose of appearing on the ballot in the election among all the employees in the unit found appropriate.

Dated, Washington, D.C.
January 31,1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

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

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
CENTER FOR DISEASE CONTROL,
ATLANTA, GEORGIA
A/SLMR No. 132

The subject case, involving representation petitions filed by two labor organizations, the American Federation of Government Employees, Local 2883, AFL-CIO (AFGE) and the National Alliance of Postal and Federal Employees, Local 303 (NAPFE), presented the question whether a separate unit consisting of employees working in the glassware and animal laboratory situation (NAPFE) or an Activity-wide unit of all employees (AFGE) was appropriate.

In all the circumstances, the Assistant Secretary concluded that both petitioned for units may be appropriate and, accordingly, he directed that self-determination elections be held. He provided that if a majority of the employees petitioned for by the NAPFE select that labor organization, a separate unit would be appropriate and that an Activity-wide unit, excluding those employees in the NAPFE unit, also would be appropriate. If, however, a majority of the employees petitioned for by the NAPFE did not select that labor organization, their votes would be pooled with the ballots of the employees voting in the Activity-wide election and an Activity-wide nonsupervisory unit would be appropriate.

With respect to the appropriateness of the units, the Assistant Secretary found that while all employees of the Activity were subject to centralized personnel policies and practices and certain working conditions, such as eating and parking facilities, he noted that supervision was set up along functional lines, there was limited interchange and transfer between the employees petitioned for by NAPFE and the employees petitioned for by the AFGE, and there were no temporary assignments between the employees of the two petitioned for units. Additionally, while the employees of both units worked in the same buildings, there was virtually no day-to-day work contact as employees in the unit petitioned for by the NAPFE were the only nonprofessional employees of the Activity who worked in the laboratory or with animals in animal breeding or holding areas.

A/SLMR No. 132

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
CENTER FOR DISEASE CONTROL,
ATLANTA, GEORGIA

Activity

and Case No. 40-2312(RO-32)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2883, AFL-CIO

Petitioner

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
CENTER FOR DISEASE CONTROL,
ATLANTA, GEORGIA

Activity

and Case No. 40-2338

NATIONAL ALLIANCE OF POSTAL AND
FEDERAL EMPLOYEES, LOCAL 303 1/

Petitioner

SUPPLEMENTAL DECISION AND DIRECTION OF ELECTIONS

Upon petitions duly filed under Section 6 of Executive Order 11491, a consolidated hearing was held before Hearing Officer Thomas J. Sheehan. Thereafter, on July 12, 1971, I issued a Decision and Remand 2/ in which I remanded the cases to the appropriate Regional Administrator to reopen the record for the purpose of securing additional evidence concerning the appropriateness of the units sought. On August 16 and 17, 1971, a further hearing was held before Hearing Officer Renee B. Rux. The Hearing Officer's rulings made at the reopened hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this matter, including the facts developed at the hearings held both prior and subsequent to the remand, I find:

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

2. The Petitioner in Case No. 40-2312(RO-32), American Federation of Government Employees, Local 2883, AFL-CIO, herein called AFGE, seeks an election in a unit of all eligible nonsupervisory employees of the Department of Health, Education, and Welfare, Center for Disease Control, Atlanta, Georgia, who work at the following locations: Clifton Road, Lawrenceville, Chamblee and Buckhead, excluding management officials, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity and supervisors and guards as defined in Executive Order 11491. 3/

The Petitioner, in Case No. 40-2338, National Alliance of Postal and Federal Employees, Local 303, herein called NAPFE, seeks an election in a unit of all nonsupervisory and nonprofessional employees of the Department of Health, Education, and Welfare, Center for Disease Control, Atlanta, Georgia, who occupy positions in the GS-400-0, GS-600-0, and GS-1300-0 classification series and all Wage Board employees working in laboratories, laboratory glassware activities and/or laboratory animal activities, who are located in the Atlanta, Georgia Metropolitan Area, including Lawrenceville, excluding managerial officials, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors and guards as defined in the Order. 4/

The Activity, herein called CDC, takes a neutral position, acknowledging that it will work with any organization or organizations certified, and asserts also that working with either labor organization, or both, will not adversely affect the efficiency of its operations.

1/ The name of this Petitioner appears as amended.

2/ A/SLMR No. 76

3/ The unit appears as amended.

4/ The unit appears as amended. The evidence establishes that the unit sought by the AFGE encompasses the employees sought by the NAPFE.

The CDC, originally known as the Communicable Disease Center until June 1, 1970, is one of approximately 10 components of Health Service and Mental Health Administration, an agency of the Department of Health, Education, and Welfare, and is responsible for coordinating the disease control functions of the Public Health Service for the purpose of centralizing a national attack on disease. In carrying out its mission, the CDC operates laboratories and other disease control facilities, both in Atlanta and field stations across the nation, as well as in Puerto Rico and foreign countries. The CDC performs research and provides aid to both local and state governments and foreign countries. In addition to the above, the CDC protects the United States from importation of disease, develops new and better health services, is engaged in a program eradicating smallpox and measles in 22 countries of West Africa, operates a malaria control program in over 20 countries around the world, provides technical assistance to various Federal agencies, and provides training for health workers from both the United States and foreign countries.

The CDC is headquartered in Atlanta, Georgia at its Clifton Road complex and employs approximately 3,600 employees, of whom about 1,855 are located in the Atlanta area. The remaining CDC employees work at several field stations located around the world, including foreign quarantine stations, major ports of entry in the United States and at all State Health Departments in the United States. In addition to Clifton Road, the CDC in Atlanta includes three other locations: Chamblee, a combination of laboratories and offices similar to Clifton Road; Buckhead, a leased office facility; and Lawrenceville, located approximately 25 miles northeast of Atlanta, consisting of 85 acres of land, and referred to as the "farm."

Organizationally, the Center Director is located at Clifton Road. Reporting directly to him are several staff services, 5/ some of which are located at Clifton Road and some at Buckhead, but all of which centrally serve all four Atlanta area facilities. Below these staff services, in a direct line from the Director are 7 programs and 2 divisions, 6/ so designated because

5/ Management Analysis Branch, Computer Systems Branch, Financial Management Branch, Administrative Services Branch, Engineering Services Branch, Library and Personnel Management Branch.

6/ The Ecological Investigations Program, Epidémiology Program, Foreign Quarantine Program, Malaria Program, Smallpox Eradication Program, Nutrition Program, Training Program, Laboratory Division and State and Community Services Division.

of their size. 7/ All of the programs and divisions are headquartered in Atlanta, except for the Ecological Investigations Program, located in Kansas City, Kansas, which controls several field operations. The heads of all programs and divisions are designated as Directors and all are located at Clifton Road, except for the Directors of the Ecological Investigations Program, noted above, and the Training Program, which is located at Buckhead.

Final authority for personnel actions is vested in either the Center Director or the personnel officer, except that the authority to approve overtime is delegated to program and division directors. Such personnel actions include appointments, action on reprimands, appeals and grievances, 8/ classification of jobs, action on in-grade and quality increases, and setting the workweek. Additionally, the Activity's personnel office handles actions concerning the filling of vacancies throughout the Atlanta area at all four locations.

The evidence discloses that there are 87 separate classifications of employees included in the unit sought by the AFGE 9/. As noted above, the AFGE's claimed unit would include the six classifications of employees petitioned for by the NAPFE. At the Clifton Road location there are a total of 726 employees covered by both petitions, of whom 181 are in classifications petitioned for by the NAPFE. At Chamblee there are a total of 64, of whom 13 are included in the NAPFE's proposed unit, and at Lawrenceville there are 44, of whom 24 are in the NAPFE's proposed unit. There are 90 employees at Buckhead, but because of the administrative nature of its operation, no employees in the proposed NAPFE unit are employed at that facility. In summary, of the total of 924 employees in the unit sought by the AFGE, 218 are also in the unit petitioned for by the NAPFE. The six classifications of employees in the NAPFE's claimed unit are

7/ A division is composed of from 500 to 700 employees, while a program will range from 40 (Nutrition) to over 300 (Foreign Quarantine).

8/ Under the existing Activity grievance procedure, an aggrieved employee would discuss informally his grievance with the individuals at the two supervisory levels above him and then put his appeal in writing to the Center Director.

9/ These classifications include general clerical and administrative as well as technical, craft, laborer, etc.

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as follows: Biological Laboratory Aid/Technician; Pathology Technician; Health Aid/Technician; Physical Science Technician; Truck Driver; and Laboratory Worker. As indicated above, employees in these classifications are found at Clifton Road, Chamblee and Lawrenceville, and work in the Epidemiology Program, State and Community Services Division and Laboratory Division. 10/

The record reveals that the Laboratory Worker works with expensive glassware and related equipment, cleaning, sterilizing, sorting and storing it, as well as inspecting it under special lighting. Additionally, an employee in this classification operates an autoclave machine and steam and hot air sterilizers and delivers glassware to and from laboratories. The Biological Laboratory Aid Technician (microbiology) works under a Microbiologist and assists in the preparation of bacterial diagnostic antisera, innoculates laboratory animals with proper antigens,bleeds animals, grows bacterial cells, performs routine serological tests, and maintains records of laboratory and animal work. Virtually all other technicians in the NAPFE's claimed unit are directly involved with animals, which are an integral part of the CDC function. Such technicians are responsible for the care of the animals in their breeding or holding areas, feeding and watering germ-free animals that require special care, and cleaning the cages or stalls that house them. In addition to collecting various blood, tissue, or other specimens as required by the unit chief and performing autopsies, these technicians are responsible for the maintaining of a high quality breeding program so as to maintain a pure strain among the animals. In performing his duties, the technician works entirely in the animal area, maintaining animals under very strict conditions. The animal Aid is responsible for a number of animal rooms and the care of the animals confined therein. The Aid insures that animals are properly fed and watered and makes certain that watering systems, heating systems, lighting systems, etc., are functioning adequately. Further, the Aid assists in testing non-human primates for diseases, assists in setting up and carrying out research experiments, collects blood or tissue specimens, performs autopsies, and is responsible for proper disposal of animals when experimentation is concluded.

Generally, there are no temporary assignments of employees either from jobs in the unit petitioned for by the NAPFE to other jobs in the AFGE's claimed unit or vice versa. Although the record reveals that employees of both proposed units may work in the same buildings, and even on the same floors, they do not work in the same rooms. Moreover, they are separated by the very

10/ Over 80 percent of the employees are employed in the Laboratory Division.

nature of their work because, due to space and safety requirements, only employees in the classifications sought by the NAPFE work in the laboratories. Similarly, there are some buildings where only the NAPFE classified employees are allowed to work or enter and working in certain laboratories is restricted to those who have received immunization shots.

The evidence discloses that in the laboratories, the employees covered by the NAPFE petition come into work contact either with other employees sought by the NAPFE or with employees excluded from both claimed units, such as professionals. The only employees sought by the AFGE having more than an occasional work contact with the employees covered by the NAPFE petition are the clerical employees located in an office adjacent to the laboratories, who usually serve about three laboratories.

In addition, supervision is established along functional lines rather than by facility or location, and there is no one supervisor or superintendent of a facility. Thus, employees of the NAPFE proposed unit working in laboratory or animal-holding units report to professional employees who, in turn, report to higher grade professionals, who report to branch or unit chiefs. The chiefs report to division or program heads, who report directly to the Center Director. Other classifications, such as the craft employees, report to supervisors of their functions, such as engineering service supervisors, who, in turn, report to the chief of engineering services who reports to the Center Director.

The record reveals also that all employees share working conditions, such as parking and eating facilities, social organizations, credit unions, and hours of work, except that some employees who operate the boiler plant and some who care for animals work a seven-day week schedule. Only a few classifications of employees in the AFGE's claimed unit wear uniforms, such as janitors and maintenance men, while it appears that laboratory personnel and employees who work with animals covered by the NAPFE's petition are supplied various types of uniforms depending upon the type of work involved.

Based on the foregoing, I find that the unit petitioned for by the NAPFE is appropriate for the purpose of exclusive recognition under Executive Order 11491. The record discloses that although all nonsupervisory, nonprofessional employees are covered by a centralized personnel program and staff services, and all share certain conditions of employment such as parking and eating facilities, there is very little actual day-to-day contact between the employees of the proposed NAPFE unit and other classifications petitioned for

in the AFGE unit. Further, employees in the NAPFE proposed unit are physically separated from those of the AFGE's proposed unit, there are no temporary assignments from one group to another and the evidence reveals minimal job transfer or interchange. Additionally, the employees petitioned for by the NAPFE are the only employees, other than professionals, who regularly work in the laboratory situation and who work with animals. As a result of their different job functions, employees in the two claimed units generally have different backgrounds, interests and goals. In these circumstances, and noting the fact that Section 10(b) of the Order specifically provides, in part, that a unit may be established on a craft, functional, or other basis, I find that a self-determination election in the unit sought by the NAPFE is warranted because, in my view, the employees involved constitute a functionally distinct group of employees with a clear and identifiable community of interest. 11/ In reaching this conclusion, I have considered also the Activity's position that dealing with the NAPFE in a separate unit would not adversely affect the efficiency of its operations.

Also, I find that the unit petitioned for by the AFGE constitutes a unit appropriate for the purpose of exclusive recognition. Thus, this group includes all of the nonsupervisory and nonprofessional employees of the Activity, all of whom generally have the same terms and conditions of employment. In these circumstances, I find that the unit sought by the AFGE is appropriate.

Based on the foregoing, I also find that the unit sought by the AFGE, but excluding those classifications sought by the NAPFE, may be an appropriate unit.

3. Having found that the employees petitioned for by the NAPFE may, if they so desire, constitute a separate appropriate unit, I shall not make any final determination at this time, but shall first ascertain the desire of the employees by directing elections in the following groups:

Voting Group (a): All employees of the Center for Disease Control who occupy positions in the GS-400, GS-600 and

11/ Although there is little evidence as to the job duties of the nine employees in the remaining four categories petitioned for by NAPFE, in the absence of any dispute as to their community of interest with the other employees of the NAPFE unit, their inclusion in the unit sought by the NAPFE was concluded to be warranted.

GS-1300 classification series and all Wage Board employees working in laboratories, laboratory glassware activities and laboratory animal activities who are located in the Atlanta, Georgia Metropolitan Area, including Lawrenceville, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, management officials, and supervisors and guards as defined in the Order.

Voting Group (b): All employees of the Center for Disease Control, Atlanta, Georgia, who work at the facilities at Clifton Road, Lawrenceville, Chamblee and Buckhead, excluding all employees voting in group (a), employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, management officials, and supervisors and guards as defined in the Order.

If a majority of the employees voting in group (a) select the labor organization (NAPFE) seeking to represent them separately, they will be taken to have indicated their desire to constitute a separate appropriate unit and the Area Administrator supervising the election is instructed to issue a certification of representative to the labor organization (NAPFE) seeking to represent them separately. In such event, the Area Administrator is instructed to issue either a certification of the results of the election or a certification of representative for voting group (b) which I find also to be an appropriate unit for the purpose of exclusive recognition. However, if a majority of the employees voting in group (a) do not vote for the labor organization (NAPFE) which is seeking to represent them in a separate unit, the ballots of the employees in such voting group will be pooled with those of the employees voting in group (b). 12/ If a majority of the valid votes of voting group (b), including any votes pooled from voting group (a), are cast for the AFGE, that labor organization shall be certified as the representative of employees in groups (a) and (b) which, under the circumstances, I find to be an appropriate unit for the purpose of exclusive recognition.

12/ If the votes of voting groups (a) and (b) are pooled, they are to be tallied in the following manner: The votes for the NAPFE, the labor organization seeking a separate unit in group (a), shall be counted as part of the total number of valid votes cast but neither for nor against AFGE, the labor organization seeking to represent the Activity-wide unit. All other votes are to be accorded their face value.

Elections by secret ballot shall be conducted among employees in the voting groups described above, as early as possible, but not later than 45 days from the date below. The appropriate Area Administrator shall supervise the elections, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the voting groups who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough including those in the military service who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible in voting group (a) shall vote whether they desire to be represented for the purpose of exclusive recognition by National Alliance of Postal and Federal Employees, Local 303; or by American Federation of Government Employees, Local 2883, AFL-CIO; or by neither. Those eligible in voting group (b) shall vote whether or not they desire to be represented for the purpose of exclusive recognition by American Federation of Government Employees, Local 2883, AFL-CIO.

Dated, Washington, D.C.
February 9, 1972

W.J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

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

DEPARTMENT OF THE ARMY,
UNITED STATES MILITARY ACADEMY,
WEST POINT, NEW YORK
A/SLMR No. 133

This representation proceeding involves a petition by Local R2-102, National Association of Government Employees, (NAGE) for a unit of all nonsupervisory Wage Board employees of the Activity. The petitioned for employees were part of an exclusively recognized unit of General Schedule and Wage Board employees, who had been represented since September 1966 by the Intervenor, Local 2367, American Federation of Government Employees, AFL-CIO (AFGE). In the alternative, the NAGE sought a unit of all Wage Board employees and all those General Schedule employees who work in a clerical capacity in direct support of the Wage Board employees.

The Activity took no position with regard to either of the proposed units. The AFGE contended that the units sought were inappropriate because: (1) the employees in question did not possess a community of interest separate and apart from the existing unit of General Schedule and Wage Board employees; (2) neither of the proposed units would promote effective dealings and efficiency of operations; and (3) the NAGE's request was based solely upon its extent of organization.

The Assistant Secretary decided that neither of the requested units were appropriate. He noted that in United States Naval Construction Battalion Center, A/SLMR No. 8, he had stated "that where the evidence shows that an established, effective, and fair collective bargaining relationship is in existence, a separate unit carved out of the existing unit will not be found appropriate except in unusual circumstances." He found no such "unusual circumstances" in this case. In this connection, he noted that the petitioned for employees have been included in the bargaining unit since 1966, and that there is in effect an established, effective, and fair collective bargaining relationship between the AFGE and the Activity. Moreover, he found that severance of either of the claimed units from the established unit would not serve to promote effective dealings and efficiency of Activity operations. In these circumstances, the Assistant Secretary directed that the NAGE's petition be dismissed.

A/SLMR No. 133

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF ARMY,
UNITED STATES MILITARY ACADEMY,
WEST POINT, NEW YORK 1/

Activity

and

Case No. 30-2547(EO)

LOCAL R2-102, NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES 2/

Petitioner

and

LOCAL 2367, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Intervenor

DECISION AND ORDER

Pursuant to a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Louis A. Schneider. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 3/

Upon the entire record in this case, including the parties' briefs, 4/ the Assistant Secretary finds:

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

2. The Petitioner, Local R2-102, National Association of Government Employees, herein called NAGE, seeks an election in a unit of all nonsupervisor Wage Board employees of the Activity, excluding all ~~management officials, employees engaged in Federal personnel work in~~ other than a purely clerical capacity, professional employees, supervisors, General Schedule employees, guards, employees who are members of a unit at the Activity for which the International Association of Firefighters, AFL-CIO, holds exclusive recognition, and all employees paid from nonappropriated funds. In the alternative, the NAGE seeks a unit of all Wage Board employees and all General Schedule employees who work in a clerical capacity in direct support of the Wage Board employees. 5/ The Activity takes no position with regard to either of the proposed units. The AFGE asserts that the proposed units are inappropriate because: (1) the employees in question do not possess a community of interest separate and apart from the existing unit at the Activity which consists of Wage Board and General Schedule employees; (2) neither of the proposed units would promote effective dealings and efficiency of operations; and (3) the NAGE's request herein is based solely on extent of organization. 6/

The record shows that in September 1966, the AFGE was granted exclusive recognition in a unit of civilian Wage Board and General Schedule employees of the Activity. Thereafter, the parties entered into a negotiated agreement, effective November 21, 1968, which has continued in effect on a year-to-year basis. 7/

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

2/ The Petitioner's name appears as amended at the hearing.

3/ The Intervenor, Local 2367, American Federation of Government Employees, AFL-CIO, herein called AFGE, objected to the Hearing Officer's permitting testimony relating to the number of its dues-paying members at the Activity. Although not prejudicial to the ultimate determination in this case, I find that the Hearing Officer was in error in admitting such evidence into the record. However, I do not consider the admission of such evidence to constitute bias by the Hearing Officer warranting his disqualification as urged by the AFGE.

4/ The AFGE's motion that Petitioner's brief be rejected as a reply brief is hereby denied.

5/ The alternative units appear as amended at the hearing.

6/ The AFGE also moved that the NAGE's petition be dismissed on the grounds that it was "defective" and barred by laches. In view of the disposition herein with respect to the subject petition, I find it unnecessary to rule on these contentions.

7/ There is no contention that the current negotiated agreement between the Activity and the AFGE constitutes a bar to the petition in this matter.

The mission of the Activity is to train an officer corps for the United States Army. It is organized into 55 components known as agencies, each of which functions to accomplish or support a particular phase of its academic programs or its non-academic operations. The Activity employs approximately 2650 civilian employees. The unit for which the AFGE holds exclusive recognition encompasses about 1848 of these employees, of whom about 1318 are Wage Board employees and 530 are General Schedule employees.

The record reveals that there is relatively little interchange or transfer between General Schedule employees and Wage Board employees. The latter group reflects a wide range of skills such as those utilized by electricians, carpenters, machinists, food service workers, truck drivers, and barbers. This diversity of skills is found in many of the agencies within the Activity. Furthermore, both General Schedule and Wage Board skills are found to exist in the various academic departments. Thus, record testimony reveals that certain Wage Board employees in the Department of Electrical Engineering maintain the equipment and assemble the apparatus used in experiments, while others, working as classroom aides, are responsible for the upkeep of classrooms as well as assisting General Schedule clerk-typists in operating mimeograph machines and procuring office supplies and mail. In this way, Wage Board and General Schedule employees support academic instructors in carrying out their duties.

The record discloses that throughout the period of its bargaining relationship with the Activity, the AFGE, as the exclusively recognized bargaining representative, has represented the interests of both Wage Board and General Schedule employees in the recognized unit. Thus, the AFGE has commented on numerous agency regulations relating to General Schedule and Wage Board employees' development and training, merit promotion, equal employment opportunity and operation of motor vehicles. Also, it has discussed parking problems, environmental pay differentials, and specific grievances with the Activity concerning all unit employees. Further, the record reveals that, at present, all of the 30 to 40 AFGE shop stewards of the exclusively recognized unit, as well as the president of the AFGE, are Wage Board employees and that most of the grievances processed by the AFGE on behalf of unit employees have involved Wage Board employees. In this latter regard, the evidence establishes that the AFGE represented approximately 19 Wage Board employees in grievance proceedings during the period January 1970 to March 1971, approximately six of which reached the formal stage. Moreover, the record shows that the AFGE has represented all employees in its recognized unit on a number of joint labor-management committees, including the Equal Employment Opportunity Advisory Committee, the Post Parking Committee, and the Safety Committee.

In United States Naval Construction Battalion Center, A/SLMR No. 8, I stated that, "where the evidence shows that an established, effective, and fair collective bargaining relationship is in existence, a separate unit carved out of the existing unit will not be found to be appropriate except in unusual circumstances." The record in the instant case reveals that there is in effect an established, effective, and fair collective bargaining relationship between the AFGE and the Activity and there does not exist any unusual circumstances which would justify the severance of either of the units sought by the NAGE from the existing exclusively recognized unit. Moreover, severance of either of the claimed units from the established unit would not, in my view, serve to promote effective dealings and efficiency of operations within the Activity. Accordingly, I find that neither the initially sought unit nor the alternate unit requested by the NAGE is appropriate for the purpose of exclusive recognition, and I shall, therefore, dismiss the petition. 8/

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 30-2547(EO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
February 28, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

8/ I have considered carefully the NAGE's motion that the case be remanded "... to clear up the clouded portions /of the record/ covering the final two days and to secure additional evidence." On the basis of the affirmative evidence contained in the record and in the absence of specific exceptions having been filed by the NAGE to the proposed corrections of the record by the Hearing Officer, which corrected record I have relied on in reaching my decision, the motion is hereby denied.

February 28, 1972

A/SLMR No. 134

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

DEPARTMENT OF THE AIR FORCE,
McCONNELL AIR FORCE BASE, KANSAS
A/SLMR No. 134

This case involved a unit clarification petition filed by Local 1737, American Federation of Government Employees, AFL-CIO, (AFGE) seeking to include in its existing exclusively recognized unit at McConnell Air Force Base, Kansas, 6 individuals in the following four job classifications: Clothing Sales Store Manager; Supervisory Fire Fighter; Pest Controller Foreman; and Supervisory Fire Protection Inspector. During the hearing, the parties stipulated that the employees in these positions perform supervisory duties as defined in Section 2(c) of the Executive Order. Nevertheless, the AFGE contended that these employees were not supervisors inasmuch as they did not discharge their supervisory duties over "employees" as defined in Section 2(b) of the Order.

The record reflected that the employees in question exercised their supervisory authority only with respect to military personnel who were engaged in the performance of their military duties.

The Assistant Secretary noted that Section 10(b)(1) of the Order provides, in part, that units should not be established including management officials or supervisors and that the Report and Recommendations of the Study Committee indicated that employees having supervisory authority have interests and responsibilities different from nonsupervisors and are part of agency management. In these circumstances, the Assistant Secretary found that, consistent with the policies of the Order, individuals exercising supervisory authority over two or more employees may not be included in bargaining units. He noted that it is immaterial whether the supervisory authority involved is exercised over unit employees, non-unit employees, or persons who, as in the subject case, may not be "employees" as defined in Section 2(b) of the Order. In determining supervisory status, the Assistant Secretary stated that he viewed as determinative the duties performed by the alleged supervisor and not the type of personnel who are working under the alleged supervision.

Based on his finding that the employees in the four disputed job classifications perform supervisory functions over two or more persons, the Assistant Secretary ordered that the unit be clarified by excluding employees within these classifications.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE AIR FORCE,
McCONNELL AIR FORCE BASE, KANSAS 1/

Activity

and

Case No. 60-2312(CU)

LOCAL 1737, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Petitioner

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Marvin R. Wesley. 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 parties' briefs, the Assistant Secretary finds:

The Petitioner, Local 1737, American Federation of Government Employees, AFL-CIO, herein called AFGE, is the current exclusive bargaining representative of a unit composed of all employees serviced by the Central Civilian Personnel Office of McConnell Air Force Base, Kansas, excluding (1) any managerial executive, (2) employees engaged in Federal personnel work, in other than a purely clerical capacity, (3) supervisors who officially evaluate the performance of employees, and (4) employees whose positions require the performing of work of a professional nature.2/

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

2/ Exclusive recognition was granted on July 13, 1967.

The AFGE seeks to clarify the status of the following four job classifications: Clothing Sales Store Manager, Supervisory Fire Fighter, Pest Controller Foreman and Supervisory Fire Protection Inspector. Six employees are included in these classifications.

During the hearing, the parties stipulated that the duties performed by the incumbents in the four positions noted above were supervisory in nature within the meaning of Section 2(c) of the Executive Order. However, the record indicates that all the employees subordinate to these alleged supervisors are in the military services and are engaged in military duties when "supervised" by the employees in the four classifications involved herein. Moreover, the record shows that employees in these classifications perform no supervisory functions with respect to nonmilitary personnel. The AFGE maintains that inasmuch as the personnel "supervised" by the incumbents in the four classifications are not "employees" within the meaning of Section 2(b) of the Order, 3/ it follows that the incumbents are not "supervisors" within the meaning of Section 2(c) of the Order 4/ and, therefore, properly may be included in the unit despite their undisputed supervisory functions.

On the other hand, the Activity contends, that the inclusion of the employees in the disputed classifications in the existing unit is unwarranted because these employees are, in fact, "supervisors" within the meaning of Section 2(c) and are, therefore, expressly excluded from employee bargaining units by Section 10(b)(1) of the Order. In this regard, the Activity urges that the determination of an individual's supervisory status requires consideration of the supervisory responsibilities to which he is assigned and the supervisory functions he performs, rather than consideration of the type of personnel who are under his supervision.

Section 10(b)(1) of the Order provides, in part, that a unit shall not be established if it includes any management official or supervisor. In this connection, the Report and Recommendations of the Study Committee, which preceded the Executive Order, clearly indicated the Study Committee's view that in the Federal service employees having supervisory authority have interests and responsibilities which are substantially different from nonsupervisory individuals. Thus, the Study Committee stated:

> "We view supervisors as a part of management, responsible for participating in and contributing to the formulation of agency policies and procedures and contributing to the negotiation of agreements with employees. Supervisors should be responsible for representing management in the administration of agency policy and labor-management agreements, including negotiated grievance systems, and for expression of management viewpoints in daily communication with employees. In short, they should be and are part of agency management and should be integrated fully into that management." (emphasis added).

In these circumstances, I find that consistent with the purposes and policies of the Executive Order, individuals exercising supervisory authority over two or more employees may not be included in bargaining units. In this regard, I find that it is immaterial whether the supervisory authority involved is exercised over unit employees, non-unit employees, or persons who, as in the subject case, may not be "employees" as defined by Section 2(b) of the Order. 5/ Furthermore, as the above-quoted language indicates, the exercise of this supervisory authority identifies the interests of individuals in these job classifications with those of management. Thus, in determining supervisory status, I view as determinative the duties performed by the alleged supervisor and not the type of personnel who are working under the alleged supervision. 6/

Accordingly, because the record in the subject case establishes that the employees in the four job classifications noted above perform super-

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3/ Section 2(b) provides, "'Employee' means an employee of an agency and an employee of a nonappropriated fund instrumentality of the United States but does not include, for the purpose of exclusive recognition or national consultation rights, a supervisor, except as provided in section 24 of this Order;"

4/ Section 2(c) provides, "'Supervisor' means an employee having authority, in the interest of an agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees,or responsibly to direct them, or to evaluate their performance,or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment;"

5/ This is not to say that members of the military services may never be considered "employees" within the contemplation of the Order. Thus, off-duty military personnel may be considered to be "employees." See e.g. Department of the Navy, Navy Exchange, Mayport, Florida, A/SLMR No. 24, and Army and Air Force Exchange Service, White Sands Missile Range Exchange, White Sands Missile Range, New Mexico, A/SLMR No. 25.

6/ My decision in United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, A/SLMR No.120, would not require a contrary result. In that decision, I found merely that under Section 2(c) of the Order, as written, for an individual to qualify for consideration as a "supervisor," he must exercise the alleged supervisory authority over two or more employees. Thus, before reaching any question as to whether the alleged supervisor's authority comes within the criteria established by Section 2(c), it must be shown initially that he, in fact, exercises authority over two or more unit employees, non-unit employees, or persons who may not be "employees" as defined by Section 2(b) of the Order. In the instant case, the record is clear that the alleged supervisors met this prerequisite.

visory functions within the meaning of Section 2(c) of the Executive Order over two or more persons, I shall exclude them from the exclusively recognized unit.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, in which exclusive recognition was granted on July 13, 1967, to Local 1737, American Federation of Government Employees, AFL-CIO, be, and it hereby is, clarified by excluding from the unit all employees in the job classifications of Clothing Sales Store Manager; Supervisory Fire Fighter; Pest Controller Foreman; and Supervisory Fire Protection Inspector.

Dated, Washington, D. C.
February 28, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

February 28, 1972

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

DEPARTMENT OF THE AIR FORCE,
ARNOLD ENGINEERING DEVELOPMENT CENTER,
AIR FORCE SYSTEMS COMMAND,
ARNOLD AIR FORCE STATION, TENNESSEE
A/SLMR No. 135

In seeking a unit of all professional and nonprofessional employees at the Arnold Engineering Development Center in Tennessee (Arnold Engineering), the Arnold Air Force Station Local No. 3218, American Federation of Government Employees, AFL-CIO (AFGE Local) and Arnold Engineering could not reach agreement on three issues.

First, Arnold Engineering alleged that the president of the AFGE Local and signer of the representation petition was a management official and, therefore, ineligible to be included in the requested unit or to act in an official capacity pertaining to its recognition, thereby rendering the petition itself null and void. Second, the petition was also contended defective as a result of an additional deficiency in the AFGE Local's organization because its secretary-treasurer was likewise a management official. Finally, and in the alternative, should the petition be found valid, Arnold Engineering argued that certain named individuals, considered by the AFGE Local to be part of the unit, were not because they, too, were management officials. One of these was also contended excludable as a supervisor.

The Assistant Secretary dismissed the representation petition, in agreement with Arnold Engineering on the first issue - namely, that the petition signer is a management official and, under Section 10(b)(1) of the Executive Order, such a petition is defective. In view of this determination, no consideration of the latter two issues was necessary.

Noting that the Executive Order does not contain, in its Section 2 definitions of various terms when used in the Order, one for "management official," the Assistant Secretary concluded that the following definition should be applied in this case, as well as future cases, because he found it to be consistent with the underlying policy of Executive Order 11491 and Executive Order 11491, as amended.

> 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 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.

Application of the above definition to this case demonstrated that Safety Engineer Williams was a management official because he was an employee having authority to influence effectively the making of policy necessary to the Activity with respect to certain kinds of safety procedures and programs. He was Arnold Engineering's sole civilian employee, a nonsupervisor and stipulated professional, acting in this particular capacity. He reported directly to only the Director of Support Services and the installation's Vice Commander. They testified to substantial reliance on Williams' safety advice and recommendations, based on his own independent judgment, which were almost "invariably" followed in formulating Arnold Engineering's safety policies in areas of Williams' expertise. Thus, his role as an "effective influencer," was proven as more than just that of an expert or professional rendering resource material for decision-making, but it reached the required point of active participation in ultimate policy determinations. The Assistant Secretary noted also that the inclusion of Williams in an employee bargaining unit would result in a conflict of interest within the meaning of Section 1(b) of the Order in that his participation in the management of the AFGE local representing such unit would be incompatible with his management functions on behalf of the activity.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE AIR FORCE,
ARNOLD ENGINEERING DEVELOPMENT CENTER,
AIR FORCE SYSTEMS COMMAND,
ARNOLD AIR FORCE STATION, TENNESSEE 1/

Activity

and

Case No. 41-2101 (RO)

ARNOLD AIR FORCE STATION LOCAL 3218,
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO 2/

Petitioner

DECISION AND ORDER

Pursuant to a petition duly filed under Section 6 of Executive Order 11491, 3/ a hearing was held before Hearing Officer Albert W. Stockell. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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

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

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/ During the course of this proceeding, Executive Order 11491 was amended by a new Executive Order, No. 11616, which the President issued on August 26, 1971, effective November 24, 1971. Notwithstanding that this case is governed by Executive Order 11491, it should be noted that Executive Order 11491, as amended, contains no relevant revisions of any Executive Order sections applicable herein. Therefore, the instant discussion and conclusions may be regarded in terms of future applicability under Executive Order 11491, as amended.

2. The Petitioner, Arnold Air Force Station Local No. 3218, American Federation of Government Employees, AFL-CIO, 4/ seeks an election in the following unit:

> All professional and nonprofessional employees at Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, excluding all employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Executive Order. 5/

The Activity, Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, 6/ raises three issues in this case: (1) the AFGE Local's president and signer of the representation petition, Arvis G. Williams, is a management official and, hence, ineligible to be included in the requested unit 7/ or to act in an official capacity pertaining to its recognition as required by Section 10(b)(1) of the Order 8/ with the result of rendering the petition itself null and void; (2) the petition is likewise defective because of an additional deficiency in the AFGE Local's organization since its secretary-treasurer, Mrs. Jerry H. Conly, although not a petition signer, is also a management official; and, in the alternative, (3) should the representation petition be found valid, 17 named individuals, considered by the AFGE Local to be part of the requested unit, are not because they are management officials. One individual in the latter group also is alleged excludable from the unit because he is a supervisor.

I find merit in the position taken by Arnold Engineering as to the managerial status of the petition signer, Arvis G. Williams, and, therefore, the instant representation petition is invalid. For this reason, I find it unnecessary to consider the remaining two issues.

4/ Herein called the AFGE Local.

5/ The unit appears as amended at the hearing.

6/ Herein called Arnold Engineering.

7/ The unit, as originally sought, consists of approximately 139 employees. During the hearing, the parties stipulated that 36 individuals should be excluded as either management officials and/or supervisors thereby reducing the proposed unit to 103 employees.

8/ Section 10(b)(1) provides, in pertinent part, that "a unit /shall not/ be established if it includes -- (1) any management official or supervisor, ..."

Although the Executive Order provides, in Section 2, definitions of various terms when used in the Order, 9/ it does not so provide for the term "management official." This is the core problem before me now, and it is obviously one which will continue to reoccur in public sector labor-management relations representation situations in the Federal Service. In order to not only determine the problem herein, but also to provide future guidance, I conclude that the following definition of management official is dictated by and consistent with the underlying policies and ultimate purpose of the Executive Order:

> 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 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. 10/

The record in this case demonstrates that Arvis G. Williams is an Arnold Engineering management official within the meaning of the preceding definition because he is an employee having authority to influence effectively the making of policy necessary to the activity with respect to certain kinds of safety procedures and programs.

Williams is the sole civilian safety engineer directly connected with the Air Force at Arnold Engineering, although there are various Air Force flying safety officers and several safety engineers employed by a private contractor associated with Arnold Engineering's overall operations. His safety responsibilities do not significantly overlap those of the Air Force safety officers and, as shown below, he exercises some limited authority in relation to the private contractor's safety activities irrespective of its own safety personnel. Of course, neither the flying safety officers nor the private contractor's safety engineers are included in the unit as proposed.

9/ See, e.g., the Section 2(c) definition of supervisor.

10/ Accord, Virginia National Guard Headquarters, 4th Battalion, 111th Artillery, A/SLMR No. 69; Veterans Administration Regional Office, Newark, New Jersey, A/SLMR No. 38; and The Veterans Administration Hospital, Augusta, A/SLMR No. 3.

There is no dispute to the conclusion that Williams does not supervise any employees and he is directly responsible to Colonel N. T. Patterson, the Director of Support Services. There are four other Support Services Divisions in addition to the Safety Office held by Williams. They are the Personnel and Administrative Division; Services Division; Aircraft Operations Division; and Security Division. Williams and Patterson are, in turn, responsible to Arnold Engineering's vice commander, Colonel Roy R. Croy, Jr., who acts as the immediate assistant to the installation's commander, Brigadier General Jessup D. Lowe.

In relation to these two officers who unquestionably qualify, on the basis of the developed record, as management officials under the first aspect of the definition stated above, Williams' function is to render advice and recommendations according to his own independent judgment and expertise (He was stipulated at the hearing as a professional.), on certain kinds of safety problems. The "Introduction" to his official position description (He is classified as a GS-14.) reads, in part:

> . . . The purpose of this position is to (a) implement the HQ AEDC aspects of the overall Center safety program and provide advice to the Director of Engineering pertaining thereto and (b) monitor the Contractor's safety programs and provide advice and assistance to the Administrative Contracting Officer in administration of the safety aspects of the Operating Contract. These safety programs involve ground, explosive, toxic, and nuclear radiation safety. Incumbent renders advice and consultation in coordinating a planned operational safety program for AEDC.

Coordination of all Arnold Engineering safety matters is through a Safety Council composed of the Commander (Lowe), Staff Surgeon, Director of Engineering, Director of Support Services (Patterson), a representative from the Directorate of Contract Management, Security Officer, Emergency Plans Officer, Flying Safety Officer, Aircraft Operations Officer, and Safety Engineer (Williams). Williams' role on the Council is likewise advisory in nature, but testimony was given that in his more immediate contact with Patterson and Croy, his opinions are almost "invariably" followed by them in carrying out Arnold Engineering's safety programs and in formulating its policies in the area of Williams' particular competence. This is apparently true notwithstanding Patterson's additional testimony that he would not hesitate to reject a recommendation by Williams which he felt was not feasible.

Thus, while at some point in Arnold Engineering's higher level organizational structure, all of Williams' safety advice and recommendations is subject to approval, this approval is usually given, and, in some instances, the final proposal is circulated over his signature as safety engineer.

The foregoing facts convince me that Williams' role as an "effective influencer" in this context is more than just that of an expert or professional rendering resource material, and that his role has been proven to reach the required point of "active participation in the ultimate determination as to what the /Arnold Engineering safety/ policy in fact will be." In such a situation, it is my view that the inclusion of Williams in an employee bargaining unit would result in a conflict of interest within the meaning of Section 1(b) of the Order in that his participation in the management of the AFGE local representing such unit would be incompatible with his management functions on behalf of the activity.

I, therefore, shall dismiss the representation petition.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 41-2101 (RO) be, and it hereby is, dismissed.

Dated, Washington, D. C.
February 28, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

February 29, 1972

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

ENVIRONMENTAL PROTECTION AGENCY,
PERRINE PRIMATE LABORATORY
A/SLMR No. 136

This case involves a complaint filed by the American Federation of Government Employees, AFL-CIO, Local 3162 (AFGE) against the Environmental Protection Agency, Perrine Primate Laboratory. Although the AFGE originally alleged violations of Section 19(a)(1), (2), (4) and (6) of the Order,it subsequently amended its complaint to allege violations of Section 19(a)(1) and (2).

The complaint stems basically from certain actions taken by a supervisor of the Respondent against an employee who also held the position of President of AFGE, Local 3162. While the complaint was based initially on events which occurred prior to October 8, 1970 (date of unfair labor practice charge) the AFGE filed a post hearing motion to amend its complaint to include subsequent threats and acts of harassment, which motion was granted by the Hearing Examiner. In affirming such motion, the Hearing Examiner noted that all matters alleged in the complaint, as amended, were litigated at the hearing.

Prior to the hearing, the Respondent filed a motion to dismiss the complaint on the basis of (1) lack of specificity and (2) that Complainant had failed to file an investigative report with the complainant as required under Section 203.3(e) of the Assistant Secretary's Regulations. The Hearing Examiner rejected both grounds and denied the motion.

The Assistant Secretary adopted the findings, conclusions and recommendations of the Hearing Examiner who held (1) that actions taken by the Respondent's supervisor against employee Jones were prompted by Jones' activity as president of the AFGE Local and, therefore, such conduct interfered with, restrained or coerced Jones in violation of Section 19(a)(1) of the Order and (2) that certain actions, (i.e., the unjustified docking of her pay and her low performance appraisal) constituted discrimination against employee Jones with respect to her opportunities for promotion and other working conditions in violation of Section 19(a)(2). In finding a 19(a)(2) violation, the Assistant Secretary adopted the Hearing Examiner's conclusion that in such circumstances the aforementioned actions inherently would tend to discourage membership in a labor organization and that there is no need to prove actual discouragement.

As part of the remedy in this case, the Assistant Secretary ordered the Respondent to expunge from Jones' personnel records an unsatisfactory performance appraisal and any discriminatory disciplinary warnings and memoranda discriminatorily restricting her freedom of movement in the laboratory on nonworking time. Additionally, the Assistant Secretary ordered that the Respondent make the necessary adjustment to compensate Jones for the three hours pay withheld as a result of discriminatorily placing her on leave without pay status.

A/SLMR No. 136

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ENVIRONMENTAL PROTECTION AGENCY,
PERRINE PRIMATE LABORATORY

Respondent

and Case No. 42-1450 (CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL UNION 3162

Complainant

DECISION AND ORDER

On November 23, 1971, Hearing Examiner Henry L. Segal issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Hearing Examiner's Report and Recommendations. Thereafter, the Respondent filed timely exceptions and supporting brief with respect to the Hearing Examiner's Report and Recommendations. 1/

The Assistant Secretary has reviewed the rulings of the Hearing Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Hearing Examiner's Report and Recommendations and the entire record in the subject case, including the Complainant's exceptions 2/ and the parties' statement of position and briefs, I hereby adopt the findings, conclusions and recommendations of the Hearing Examiner.3/

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 Perrine Primate Laboratory, Environmental Protection Agency, shall:

1. Cease and desist from:

(a) Discouraging membership in the American Federation of Government Employees, AFL-CIO, Local 3162, or any other labor organization, by discriminatorily issuing unsatisfactory performance appraisals to employees and by discriminatorily placing employees on leave without pay status, or otherwise discriminating in regard to hire, tenure, promotion or other conditions of employment.

(b) Issuing discriminatory disciplinary warnings to employees.

(c) Issuing discriminatory memoranda restricting privileges of employees with respect to freedom of movement within the laboratory on nonworking time.

1/ The Complainant also filed a timely post-hearing brief.

2/ In its exceptions and accompanying brief, the Complainant questioned the Hearing Examiner's finding of a 19(a)(2) violation where he concluded that the evidence of actual discouragement of membership in a labor organization was "inconclusive." In agreement with the Hearing Examiner, I find that those acts of discrimination found herein, by their very nature, inherently would tend to discourage membership in a labor organization. In such circumstances, proof of actual discouragement is not required in order to find a violation of Section 19(a)(2) of the Executive Order.

3/ In the circumstances of this case, including particularly the fact that both parties were in doubt as to whether there was an established agency grievance procedure in existence at the time Mrs. Jones filed her grievances because of the pending transfer of the laboratory to the Environmental Protection Agency, I find, in agreement with the Hearing Examiner, that the Respondent's failure to process her grievances was not violative of the Order. In view of the foregoing conclusion, I find it unnecessary to pass upon the Hearing Examiner's additional finding in this respect, i.e., that the Respondent's failure to act on Mrs. Jones' grievances was privileged in the absence of a negotiated grievance procedure.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Section 1(a) of Executive Order 11491.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Order:

(a) Make the necessary adjustment to compensate Mrs. Phyllis A. Jones for three hours pay withheld as a result of discriminatorily placing her on leave without pay status on October 1 and October 20, 1970.

(b) Expunge from Mrs. Phyllis A. Jones' personnel records the unsatisfactory performance appraisal given her in November 1970.

(c) Expunge from Mrs. Phyllis A. Jones' personnel records discriminatory disciplinary warnings and memoranda discriminatorily restricting her freedom of movement in the laboratory on nonworking time.

(d) Post at its facility at the Perrine Primate Laboratory, Perrine, 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 of the Perrine Primate Laboratory 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 Laboratory Director 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 ten (10) days from the date of this Order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
Februray 29, 1972

W.J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT discourage membership in the AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 3162, or any other labor organization, by discriminatorily issuing to employees unsatisfactory performance appraisals and by discriminatorily placing employees on leave without pay status, or otherwise discriminating in regard to hire, tenure, promotion or other conditions of employment.

WE WILL NOT issue discriminatory disciplinary warnings to employees, and discriminatory memoranda restricting privileges of employees with respect to freedom of movement in the laboratory on nonworking time.

WE WILL make the necessary adjustment to compensate Mrs. Phyllis A. Jones for three hours withheld as a result of discriminatorily placing her on leave without pay status on October 1 and October 20, 1970.

WE WILL expunge from Mrs. Phyllis A. Jones' personnel records the unsatisfactory performance appraisals given her in November 1970.

WE WILL expunge from Mrs. Phyllis A. Jones' personnel records discriminatory disciplinary warnings and memoranda discriminatorily restricting her freedom of movement in the laboratory on nonworking time.

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

PERRINE PRIMATE LABORATORY
Perrine, Florida
(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 of compliance with its provisions, they may communicate directly with the Regional Administrator of the Labor-Management Services Administration, U.S. Department of Labor, whose address is Room 300, 1371 Peachtree Street, N.E., Atlanta, Georgia 30309

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

ENVIRONMENTAL PROTECTION AGENCY
PERRINE PRIMATE LABORATORY 1/

Respondent

CASE NO. 42-1450 (CA)

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 3162

Complainant

Robert J. McManus, Staff Attorney,
Office of the General Counsel,
Environmental Protection Agency,
1626 K Street, N. W., Washington,
D. C. 20460, for the Respondent
Neal Fine, Assistant to the Staff Counsel,
American Federation of Government Employees,
400 First Street, N. W., Washington, D. C.
20001, for the Complainant

Before: Henry L. Segal, Hearing Examiner

REPORT AND RECOMMENDATIONS

Statement of the Case

This proceeding, heard at Miami, Florida, on August 17 and 18, 1971, arises under Executive Order 11491 (herein called the Order) pursuant to a Notice of Hearing issued by the Regional Administrator

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

of the Labor-Management Services Administration, United States Department of Labor, Atlanta Region, on June 10, 1971, in accordance with Section 203.8 of the Regulations of the Assistant Secretary for Labor-Management Relations (herein called the Assistant Secretary). It was initiated by a complaint filed by the Complainant on January 25, 1971, alleging that Respondent has engaged in and is engaged in violations of Section 19(a), subsections (1), (2), (4) and (6) of the Order. By letter dated February 8, 1971, to the Area Administrator of the Department of Labor in Miami, Florida, the Respondent amended its complaint to delete the references in the original complaint to Section 19(a), subsections (4) and (6). Accordingly, the Notice of Hearing directed a hearing with reference only to alleged violations of Sections 19(a)(1) and (2) of the Order.

At the hearing both parties were represented by counsel who were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue orally and file briefs. Upon the entire record in this matter, from observation of the witnesses and after due consideration of the briefs filed by the parties, I make the following:

Findings and Conclusions

I. The Substantive Issues

Basically involved in this proceeding are certain actions taken by Dr. Morris Cranmer, a supervisor of the Respondent, against Mrs. Phyllis Jones, an employee of the Respondent and president of Complainant, which the Complainant alleges were acts of harassment and intimidation engaged in because of Mrs. Jones' activity as president of Complainant.

The issues before me are whether the Respondent, by the actions of Dr. Cranmer, interfered with, restrained, or coerced an employee in the exercise of the rights assured by the Order within the meaning of Section 19(a)(1) of the Order and/or encouraged or discouraged membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment within the meaning of Section 19(a)(2) of the Order.

II. Procedural Issues

Before a discussion of the substantive issues is appropriate it is necessary to dispose of certain procedural matters raised by the Respondent and the Complainant.

On July 20, 1971, Respondent filed a motion to dismiss the complaint with the Regional Administrator, Atlanta region, on two grounds:

1. Complainant has failed to comply with Section 203.3(c) of the Regulations of the Assistant Secretary in that the Complaint does not contain
   > "a clear and concise statement of the facts constituting the alleged unfair labor practices, including the time and place of occurrence of the particular acts. . . ."

2. Complainant has failed to comply with Section 203.3(e) of the Regulations in that it has failed to file an investigative report with the complaint.

The Regional Administrator referred the motion to me pursuant to Section 203.18(b) of the Assistant Secretary's Regulations on July 23, 1971. Thereafter, on July 27, 1971, I issued an "Order To Show Cause" on the Complainant as to why the Respondent's motions should not be granted. Complainant duly responded to my Order. By teletype dated August 9, 1971, I advised the parties that I was withholding ruling on Respondent's motion to dismiss and that the hearing would proceed as scheduled on August 17, 1971. At the hearing, I advised the parties that I would make recommendations to the Assistant Secretary with respect to Respondent's pre-hearing motion to dismiss the complaint in my post hearing "Report and Recommendations."

With respect to the Respondent's pre-hearing contention that the complaint should be dismissed because of the failure of Complainant to comply with Section 203.3(e) of the Assistant Secretary's Regulations in that it failed to file an investigative report with the complaint, I conclude that this contention was untimely raised. In a recent case, the Assistant Secretary held that a similar contention must be made to the Area Administrator during the investigation period provided for in Section 203.5 of the Regulations and certainly prior to the time the Regional Administrator issues the Notice of Hearing. 2/

2/ Veterans Administration Hospital, Charleston, South Carolina, A/SLMR No. 87.

500-836 O - 73 - 7

With respect to the contention that the complaint lacked sufficient specificity to meet the requirements of Section 203.3(c) of the Assistant Secretary's Regulations, I conclude that the content of the complaint meets the requirements of Section 203.3 of the Regulations. As amended by Complainant's letter of February 8, 1971, the complaint clearly alleges a violation of Section 19(a)(1) and (2) of the Order because of "continued harassment and intimidation of Mrs. Phyliss W. Jones as a federal employee and President of American Federation of Government Employees (AFGE) Local 3162, thereby interfering with her rights afforded by E. O. 11491."

The complaint also alleges that Mrs. Jones filed two grievances with Dr. Cranmer on November 1 and 10 which were not responded to, and that he gave her an unsatisfactory performance rating on November 12, 1970. Further, the complaint includes a general allegation, "In his every day actions, expressed either verbally or through written memorandums (sic), he [Dr. Cranmer] has continually attempted to harass and intimidate Mrs. Jones. . . ." The complaint incorporates by reference the unfair labor practice charge which was filed on October 5, 1970. The unfair labor practice charge contained specific incidents and dates.

One of the functions of a complaint is to put the Respondent on notice as to what allegations it must defend against. At the hearing there was no indication that the Respondent had any misconceptions as to the allegations it would have to defend against, and there was no request for additional time to prepare a defense for any "surprise" testimony. The Respondent was given full opportunity to present its witnesses and contentions. Accordingly, I will recommend to the Assistant Secretary that he deny the Respondent's pre-hearing motion to dismiss. 3/

Along the same line as its pre-hearing motion to dismiss, the Respondent, at the hearing, moved to restrict the hearing to the incidents set forth in the complaint and unfair labor practice charge. It made this contention because in Complainant's response to my show cause order issued in connection with the Respondent's motion to dismiss, Complainant referred to other alleged instances of harassment of Mrs. Jones. Actually, the complaint did contain a general allegation of harassment and intimidation of Mrs. Jones in violation of

3/ cf. Veterans Administration Hospital, Charleston, South Carolina, supra.

the Order. The additional matters litigated at the hearing were merely extensions of the allegations in the complaint, and as noted above, the Respondent fully defended against all contentions and did not request additional time to prepare a defense for additional incidents. Accordingly, I will consider all material incidents which, in fact, fall within the general allegations of the complaint, and will recommend that the Assistant Secretary deny Respondent's partial motion to dismiss made at the hearing. (It is noted that Respondent, in its post-hearing brief, makes no reference to its various procedural motions to dismiss the complaint.)

The Complainant, as part of its post-hearing brief, moved to amend the complaint to include all threats and acts of harassment and intimidation made by management against Mrs. Jones on and subsequent to September 25, 1970. Section 203.15(g) of the Assistant Secretary's Regulations empowers the Hearing Examiner to rule on motions to amend pleadings prior to transfer of the case to the Assistant Secretary. In view of my discussion above, bearing in mind that all matters were fully litigated, it is appropriate to grant the motion to amend where the amendment conforms the complaint to the evidence adduced with respect to specific incidents of alleged harassment and intimidation which are extensions of the general allegations in the complaint. 4/ Accordingly, Complainant's motion to amend the complaint is granted.

III. The Unfair Labor Practices

A. The Respondent's Operations

The mission of the Perrine Primate Laboratory, located approximately ten miles south of Coral Gables, Florida, is to study the potential health effects of pesticide chemicals. This is done primarily by laboratory studies on monkeys. It also engages in related activities dealing with the pesticide problem.

4/ The Assistant Secretary will take into account experience in the private sector. Charleston Naval Shipyard, A/SLMR No. 1. The National Labor Relations Board has permitted amendments to pleadings in similar circumstances. See, e.g., The Lion Knitting Company, 160 NLRB 801.

The laboratory was started in the latter part of 1964 when it was part of the U. S. Public Health Service. Later it was transferred to the Food and Drug Administration of the Department of Health, Education and Welfare. Finally, with the inception of the Environmental Protection Agency in December 1970, the laboratory became part of that agency.

There are approximately 68 employees at the laboratory of which half are professionals.

B. Work Assignments of Mrs. Jones

Jones started her career at the laboratory on May 10, 1966. She had previously been employed for ten years by the Department of the Air Force. There, at various times, she received a superior performance award, letters of commendation, and an outstanding performance rating. Her first job at the laboratory was as a clerk in personnel.

In September or October 1968, Jones was elected president of a local affiliated with National Federation of Federal Employees which was predecessor of the Complainant. (Complainant received its certification as exclusive representative under Executive Order 11491 on May 5, 1970. 5/ Jones continued as president of the Complainant.) Ten days after her election to the presidency of the predecessor labor organization in 1968 she was transferred from her job as a personnel clerk to the library as a librarian technician, GS-4. Dr. William Durham, director of the laboratory, testified that when Jones was elected president of the local, he was of the opinion that the presidency was not compatible with her job as a personnel clerk. He checked with his personnel people in Washington and was advised that it was not contrary to regulations for an officer of a labor organization to hold a position as a clerk in personnel. During this time, the laboratory was in process of being transferred to the Food and Drug Administration from the Public Health Service. Durham received a direct order from his "boss" at Public Health Service

5/ The unit for which it received exclusive recognition is "all non-supervisory, non-professional employees of the Perrine Primate Research Branch who hold appointments not limited as to time, excluding all professional employees, management officials, supervisors, guards and employees engaged in federal personnel work in other than a purely clerical capacity."

to transfer Jones from the personnel office. The reason given was that she was making telephone calls direct to the personnel people at Food and Drug (it was during this time that the laboratory was being transferred to Food and Drug from the Public Health Service) rather than to the Communicable Disease Center in Atlanta to which the laboratory reported directly while under the Public Health Service. Durham did not know what the subject of the calls was or whether they involved union matters. 6/ Hence Jones was transferred to her present job.

C. Supervision of Jones

From October 1968, when she was transferred to the library, until April 1970, Jones was principally under the direct supervision of laboratory Director Durham. In April 1970, the library was placed under the supervision of Dr. Morris Cranmer.

Jones worked in the library by herself during the time she was under Durham's supervision and at the time of the change to Cranmer. She had no training in library sciences and no substantial experience in library work. It must be remembered that the library was a technical library very important to the type of work being performed by the professionals at the laboratory.

There were many things wrong with the library. Durham testified that while he supervised the library he received complaints from some of the professionals with respect to neatness and inability to find desired materials.

Significant along this line is the testimony of Dr. Henry Enos, Chief of the Chemistry Branch. Enos and the chemists under his supervision are steady users of the library. On two occasions he complained to Durham about the library at staff conferences. In response to a question as to what was unacceptable about the library, he stated:

> "Well, there was, first of all, in the normal management of a library, there didn't seem to be any consistent system for cataloging books, for making sure that books were being purchased as they were available on the market,

6/ Of course, there was no explanation given as to how a transfer would cause a discontinuance of the telephone calls.

> for updating and maintaining the library, and just keeping the library in some semblance of order, to keep the journals in order, et cetera."

Of course, Mrs. Jones was the only employee in the library. Enos's desires as to how a library should be run, to say the least, was much to expect from a GS-4 clerk with no library training. In fact, Enos recommended that Durham should prevail on his superiors to permit the hiring of a full-time trained librarian.

With these complaints in mind, Durham realized that with all his duties as laboratory director plus extra curricular teaching duties, he could not give the library the attention it required. He asked Enos to take over the supervision of the library. Enos "begged off" because of the volume of his work. Finally, Dr. Morris Cranmer agreed to take over the supervision of the library, and he was so assigned in April 1970. It must be realized that Dr. Cranmer was already chief of the Pharmacology Branch. As such, he supervised the pharmacology section, as well as the physiology section, the services sections and the biochemistry and metabolism section. Supervision of the library was an additional duty.

With respect to trained personnel, sometime subsequent to Cranmer assuming the library, Mr. Richard Cook, who has a master's degree in library science, was hired on a part-time basis. More about Mr. Cook later.

D. Alleged Harassment and Intimidation of President Jones

(1) The Administrative Leave Incident. This incident is basic to the Complainant's theory. It reasons that because of Jones' intervention as president of the local, Cranmer engaged in the various acts against Jones discussed below.

According to the record, the problem of allegedly improper leave granted to certain employees had been a concern of the local for the past two years. Jones testified that in September 1970, Stella Hickerson, who is Cranmer's secretary and who keeps the time and attendance cards for employees under Cranmer's supervision, complained to Jones that she was required by Cranmer to show an employee, a Miss Spiegel, as being present when Spiegel was actually

not present, and that she was afraid of getting in trouble for falsifying a time card. She requested that Jones do something about it. (Hickerson was not a member of the union, but she was included in the appropriate unit.) Jones told Hickerson to put the complaint in writing, but she did not do so. However, Jones did raise the problem with Mr. Kenny, the laboratory administrative officer. On September 25, 1970, Jones was off sick when she got a call from a union member, apparently Mrs. Barbara Elwert, who advised that Hickerson was upset because Cranmer had just returned from a trip and was angry about the leave incident; Hickerson wanted Jones to come in and tell Cranmer that it was not her (Hickerson) that had told Jones about Miss Spiegel's leave record. Jones did come to the laboratory and speak to Cranmer. She advised Cranmer that she had spoken about the leave problem to Mr. Kenny, the administrative officer, but that no further action would be taken since the complaint was not put in writing. Cranmer replied that he was glad that she had so advised him. He went further, however, to tell Jones that she was the "focal point" around which all the other trouble makers revolved, that he was going to punish her and all the other trouble makers he could identify, that she had better be careful about what she did from now on, that she had better not be one minute late to work, that she had better not make one mistake because he would use it against her and "he was going to get her out of there."

Cranmer explains the matter as follows. Spiegel was hired in the Spring of 1970 as a biologist. Through some payroll problem, she worked for the laboratory for a period of time without getting paid. Moreover, her project involved the use of fish, and she would come in nights and weekends to feed and water the fish. Accordingly, with the consent of laboratory director Durham, it was decided to reimburse her by giving her administrative leave for two weeks of her vacation. Cranmer gave his timekeeper, Hickerson, the necessary instructions before he left in the latter part of August 1970, for an extended tour of the country on laboratory business, from which he did not return until September 25, 1970. Miss Spiegel was on leave around the same time. 7/

7/ Dr. Cranmer had "dated" Miss Spiegel. The laboratory had a relatively small complement, and unfortunately there was some unfounded rumor (Mrs. Jones was also guilty of believing in the rumor) that Miss Spiegel accompanied Cranmer on his trip.

While on his trip, Cranmer received a telephone call from Administrative Officer Kenny inquiring about Miss Spiegel's leave, stating that Jones had complained to him concerning this matter. Cranmer explained the circumstances to Kenny and reminded him that he had cleared the procedure with Kenny and Durham.

Mrs. Hickerson contradicted Mrs. Jones' testimony, and denied that she had ever complained to Mrs. Jones about having to mark Miss Spiegel present. Mrs. Hickerson further testified in substance that before Dr. Cranmer left on his trip he instructed her to mark Miss Spiegel present and advised her that it was to compensate Miss Spiegel for work performed without pay.

That Jones became involved in the problem of Spiegel's leave cannot be denied. Cranmer admitted that while on his trip he received a call from Kenny concerning Mrs. Jones' complaint. On the other hand, there is a direct conflict of testimony between Jones and Hickerson, as to whether Hickerson sought the involvement of Jones and later reneged. As between the two, I find Jones' testimony more trustworthy and I am crediting her. Her testimony rang true and did not seem contrived. In fact, Jones' testimony was corroborated in part by Mrs. Barbara Elwert, secretary to Dr. Enos and secretary to the local, who testified that Hickerson asked her to use her influence with Jones to drop the whole thing as she was afraid of what Cranmer would do to her when he got back. I can well understand why Hickerson would not want Cranmer to know of any complaint she may have made to Jones. She was Cranmer's secretary, and obviously a secretary's relationship to her superior could well become alienated if she accused him of some allegedly improper practice.

Cranmer's version of the meeting with Jones on September 25, 1971, is that the tenor of Jones' remarks was that Miss Spiegel accompanied him on this trip and that he had carried her illegally on time cards. Jones said a union member came to her to complain about the matter and she was bringing the matter to him. Cranmer testified that he told her that if she cared to bring these charges up, to discuss them with Durham. Cranmer avers that the reason Jones was in the office in the first place was that he had asked her to come in and discuss her work performance. He stated that he gave her this direction before he left on his trip. (In fact before he left on his trip he had caused Jones to prepare a list of tasks she would accomplish while he was gone.)

There is an element of truth in both versions of the conversation. Unfortunately conversations lend themselves to interpretations by the time witnesses testify. However, it is noted that Cranmer did not testify as to many of the specific statements which Jones credits to him. These statements attributed to Cranmer are certainly compatible with the atmosphere of the meeting, and I conclude that Cranmer did make statements to Jones such as that she was the "focal" point of all the trouble makers, that she had to be careful and not make mistakes or he would have her out of there.

(2) Alleged Incidents of Harassment Subsequent to September 25, 1970

According to Jones, all her problems with Cranmer arose after September 25, 1970, because of her activity as union president in connection with Miss Spiegel's leave. However, Cranmer testified that from the time he took over the library in April 1970, he had to orally admonish Jones because of tardiness and absence. He testified that often she was 15 or more minutes late to work and left work often 15 or minutes before closing time. (The hours of the laboratory were always 8 A.M. to 4:30 P.M. with one-half hour for lunch - from 12:00 to 12:30 P.M.)

As early as May 12, 1970, Cranmer sent Jones a memorandum setting forth procedures for leave and the necessity for rigid hours in the library, as follows:

a. On a request for leave she would have to notify either Mrs. Hickerson or himself; that information obtained from others was not acceptable; that the actual granting of leave would come from him or in his absence from the officer in charge or administrative officer;

b. That her leave record was in arrears and to make up she could accrue compensatory time to draw against rather than annual leave. Extra hours of work, however, had to be approved in advance by Cranmer;

c. Since there is no lunch room available at the laboratory if she wanted to eat at a commercial establishment and needed more that half an hour

she would have to make up the time; that her schedule must be rigid since the staff relied on the library and they had to know when they could find assistance; that a few minutes one way or another might waste a trip to the library for a scientist and the only purpose of support personnel is to save the scientists' time.

Aside from the above instruction memorandum from Dr. Cranmer, Jones received no memoranda from Cranmer complaining of specific matters until after September 25, 1970, when the following incidents occurred.

(a) Mrs. Jones' lunch period, Cranmer's memorandum of October 1, 1970

On October 1, 1970, Jones received a memorandum from Cranmer referring to the last paragraph of the May 12, 1970 memorandum requiring that her schedule be rigid. The memorandum stated further that he was in the library at 11:35 A.M. and Jones was not there, and that since she did not ask for a change in her schedule, she was absent without permission; that he returned at 12:05 P.M. and still did not find her in the library; that an explanation was required before her record would be clear.

According to the unrebutted testimony of Jones and Barbara Elwert, they had always gone to lunch from 11:30 to 12 noon, and until October 1, 1970, Cranmer had not criticized this deviation. Both testified that on that day they went to lunch together at 11:35 and returned at 12:05. Jones testified that she was very careful not to take more than half an hour for lunch, especially in view of Cranmer's May 12, 1970 memorandum and his warning on September 25, 1970 that she had better not take more than half an hour for lunch. Both Jones and Elwert testified that Richard Cook was present in the library when they left and when they returned, and that Cranmer could have gotten assistance from him. (By this time, Cook, who holds a masters degree in library science, was on board as a part-time librarian, GS-9. He worked daily hours from 8 A.M. to 1:30 P.M.) While Jones and Elwert quite definitively stated that Cook was there when they left and returned, their testimony was slightly in conflict as to why they surmised he was in the library while they were gone. Jones stated that Cook eats lunch at his desk and when she and Elwert

left, Cook was making his usual meticulous preparations for lunch, such as setting a cloth and napkins. Elwert stated that Cook was at his desk working when they left, but was eating when they returned. Cranmer testified that Cook was not in the library when he (Cranmer) went in at 11:35 A.M. and returned at 12:05 P.M. He indicated that he was not "upset" by the fact that Cook was not in the library since he assumed that Cook was at the University of Miami library doing some research for him. Jones testified that normally when Cook had research to perform at the University of Miami he did it in the morning and came in late or left early to do it on the way home, since he passed the University of Miami between his home and the laboratory.

From that date, Jones changed her lunch time to 12 noon to 12:30 P.M.

(b) Mrs. Jones' leave problem, Cranmer's memorandum of October 2, 1970

The next memorandum from Cranmer to Jones came the next day, October 2, 1970. On October 1, 1970, Mrs. Jones told Cranmer in the afternoon that she felt sick, and requested one hour annual leave. He concurred, but requested that she check with Hickerson. When Jones advised Hickerson, Hickerson commented to Jones that she was sorry that Jones had all this trouble. Jones replied that Hickerson should not worry, that she would call Mr. Garrison (National Vice-President, AFGE) and maybe he could do something about it. Mrs. Jones left for annual leave for an hour.

After Jones left for the afternoon, Hickerson sent a memorandum to Cranmer stating in substance that although he had told her that Jones was going home for illness, when she asked Jones to sign her card, Jones said the real reason she was leaving was to do something about Dr. Cranmer. Whereupon, the next day, Cranmer wrote to Jones advising her of Hickerson's comments, and further warning that unless Jones provided him with evidence to the contrary her absence from 3:30 P.M. to 4:30 P.M. would be regarded as "Absence Without Leave."

Hickerson testified that Jones had advised Cranmer that she was sick, but later Jones told her (Hickerson) that she was not sick but was going home to do something about Cranmer. Hickerson testified

that she wrote the memorandum because Jones' time was not good and she had to seek approval in advance for time off, so Hickerson thought that it was her duty to advise Cranmer.

The Respondent emphasized at the hearing that Jones' leave record was bad. Admittedly Jones used up and borrowed on her sick leave in 1969 when she was absent for an extended time in connection with a cancer operation. Thus, since June 1969, she has taken annual leave only to cover both sick leave and annual leave. There is no contention that she didn't have an annual leave balance on her books to cover the hour. Although, the Respondent alleges that Jones was a chronic offender with respect to annual leave, no documented evidence was presented to show her record since her return from her operation, nor was any comparison made of her leave with that of the other employees.

Jones answered Cranmer's memorandum of October 2, 1970, in a sarcastic manner, telling him she was sick and that if he wanted she would get an "impartial panel," that she would show him her "big toe" (one of her ailments was an infected toe) and would "throw up" if he wanted her to. She also indicated in the memorandum that she could see nothing wrong with making a telephone call while she was on sick leave. It is understandable why Jones would be sarcastic under the circumstances.

On 10 November 1970, Mrs. Jones wrote to Durham appealing with respect to the deduction of the one hour's pay pursuant to FPM Chapter 771. In the letter she outlined her position in the matter. (The union has no negotiated agreement with the Respondent and there is no negotiated grievance procedure.) The Respondent did not reply to this letter.

(c) Mrs. Jones' manuscript problems

On October 2, 1970, Jones was given a manuscript to type by Cranmer (the Handy-Cranmer manuscript). Cranmer testified that when he came back from his trip (the business trip described above when he was absent from late August to September 25, 1970) there were many manuscripts, etc., to be typed. All the girls who typed similar documents were burdened with work. Since Jones' job description called for typing, he gave the job to her. He testified that this manuscript was to be published in a trade journal, and he wanted Jones

to give the manuscript priority. Jones testified that she had no previous instructions on the proper preparation of such manuscript, and this was the first such given to her. Her typing in the library consisted of preparation of library cards, letters to publishers, filling requests for reprints. The work on the manuscript was an addition to her regular work in the library. On October 8, 1970, Cranmer gave Jones a memorandum regarding her progress on the manuscript. He noted that she had given priority in typing to other documents. He directed in the memorandum that commencing October 12, 1970 she should budget 8 A.M. to 10:00 A.M. each day to typing manuscripts, until the backlog of manuscripts was dissipated; that she should complete one manuscript before starting another.

On October 12, 1970, Cranmer again wrote to Jones complaining that he had checked in the morning with her and found that instead of completing the first manuscript, she was working on a second manuscript. He further stated that her "failure to follow instructions led to a sub-performance."

On October 13, 1970, Cranmer again wrote to Jones advising that he checked at 9:40 A.M. that day, and instead of working on manuscripts Jones was working on reprints to be mailed. He warned her that she was not to change her work schedule without consulting with him. Jones testified that on the day in question, the Secretary for Durham, the laboratory chief, asked her to assist in preparing a large number of reprints to be mailed out that morning, and that she considered serving customers of the library to be her main function. She testified this was the first time she was restricted to straight typing for two hours without the option of helping somebody who came in the library for books and reprints.

On October 15, 1970, Cranmer again wrote to Jones complaining that he had observed her working on a manuscript out of proper order, and that she had to follow his schedule and instructions. The record reveals that the manuscript which Cranmer was complaining of was a short manuscript which Jones typed for another scientist during her lunch period.

(d) Restrictions on Jones' movements, Cranmer's memorandum of October 16, 1970

On October 16, 1970, Jones wrote a response memorandum to Cranmer. In it she stated that since Cranmer's "harassment program" she was unable to leave for lunch like other employees. Therefore

during her lunch period she typed a short manuscript for a scientist. She stated further, "I am amazed that you would consider my voluntarily typing any laboratory work on my own time as evidence of my bad attitude. I bet you are the only supervisor in the entire Federal government who would critize a subordinate for doing this." Mrs. Jones' memorandum explains her problems with the manuscripts and concludes with the following paragraph: "I am also waiting to receive your letter of admonishment which you began working on about the 1st of October. Since it covers my leave use, and attitude, et al, from your unbiased viewpoint, it should be very interesting."

Cranmer testified that he was preparing a letter of admonishment, which he never sent out. The typed draft was kept in his desk and in it he used the expression "from my unbiased viewpoint." He surmised that Mrs. Jones had looked in his desk. Thus, on the same day, October 16, 1970, Cranmer sent Jones another memorandum giving specific answers to her contentions in her memorandum. In the last paragraph of his memorandum, Cranmer restricted her movements in the laboratory when she arrived before 8 A.M. or stayed after 4:30 P.M., giving reasons for doing so as follows:

> "Your comments as to a letter of admonishment should be supposition on your part since I have not discussed the issue with you or your comments are an indication that you have obtained unauthorized access to confidential material. Since you offer specifics it appears you have improperly entered my office or Mrs. Hickerson's desk. Since I have had complaints about you being in areas other than your duty station and your examining personal effects on the desks of staff members and found you in the door of my office on October 2 upon arriving at work you will follow the following guidelines. If you arrive at the laboratory prior to 8:00 AM or stay past 4:30 you will not occupy areas other than the zerox room, the library, the ladies room or the receptionist area. You will not enter my office at anytime I am not present."

Cranmer justifies this memorandum further on the ground that Jones would stop other people in the reception area to check on their time of arrival at work and time for lunch.

Jones testified that she did not look in the desks of Cranmer and Hickerson. She stated that she merely guessed that Cranmer was

preparing a letter of admonishment. Further, she heard rumors that such letter of admonishment was being prepared, and she noted Hickerson working very secretly on a memorandum.

(e) Requirement of annual leave for tardiness, Cranmer's memorandum of October 19, 1970

On October 19, 1970, Cranmer wrote another memorandum to Jones criticizing her for writing long memoranda on government time and stating that her work was in arrears. In the memorandum Cranmer advised Jones in substance that if she was not on duty by 8:00 A.M. she would be docked one hour annual leave; that she would not have to work this hour but would have to be on duty by 9:00 A.M., and if not on duty by 9:00 A.M., she would be docked another hour of annual leave.

(f) Assessment of Leave Without Pay for tardiness, Cranmer's memoranda, October 20, 1970

On October 20, 1970, Jones received two memoranda from Cranmer. The circumstances were as follows. On October 20, 1970, Jones arrived at the laboratory before 8:00 A.M. She proceeded with Elwert to the office coffee pot to get coffee. (Use of the office coffee pot was apparently the custom of many employees.) She arrived at her desk at 8:00 A.M. and found the first memorandum from Cranmer that day on her desk telling her she was late and would be docked one hour, that she could take off an hour but must return by 9:00 A.M. (Cranmer testified that he listened to the 8:00 A.M. news on the radio in his office before he left the note on Jones' desk.) Jones complained to Cranmer that he was mistaken about her tardiness. Jones then proceeded to Dr. Durham's office to discuss the matter. She was accompanied to the office by Elwert and Cranmer. There was a heated discussion, where Durham sustained Cranmer. Jones then left with Elwert and arrived at her desk at approximately two minutes after nine. She found a second memorandum on her desk from Cranmer docking her another hour for not being at her desk at 9:00 A.M. (Cranmer testified that the conversation in Durham's office ended soon enough so that Jones could be at her desk at 9:00 A.M., but she stood around Durham's anteroom discussing the matter with Elwert.)

Elwert's testimony confirms Jones. Cranmer had testified that at one point Jones made an offensive gesture to him, which Jones denied.

Elwert also testified that Jones did not make an offensive gesture. Elwert testified further that her supervisor, Dr. Enos, did not charge her leave without pay for the time she spent with Jones. Nor was she ever charged for being a few minutes late to work or from lunch.

(g) Performance Appraisal of Jones, November 1970

While the laboratory was under the aegis of the Food and Drug Administration of Health, Education and Welfare, it used a performance appraisal form which was used for promotion purposes. (The Respondent was not certain as to whether the Environmental Protection Agency would be using a similar form.) Cranmer prepared a performance appraisal form on Jones as of November 12, 1970, to cover from November 1969 to November 1970. The instruction on the form provides that 38% of the employees should be rated as C (good), 24% B (very good), 24% D (adequate), 7% (excellent) and 7% E (unsatisfactory). Cranmer gave Mrs. Jones a rating of 1.8 or unsatisfactory. The form lists 20 factors (given specific numerical weights), and each contains five descriptive sentences (from a. to e.) from which the rater makes his choice, the a. choice being the worst. Of the 20 factors listed, Cranmer rated her a. or the worst on 8, b. or next to the worst on 10, and c. or middling on 2. Dr. Durham testified that this appraisal given by Cranmer to Jones was the worst ever in the laboratory. Cranmer gave Jones this appraisal after seven months of supervision over her.

Dr. Durham rated Jones on an identical form in September 1969, after Jones had been under his supervision for two years. Dr. Durham testified that he is very experienced in preparing appraisals, and that he considered that his appraisals were honest. Dr. Durham rated Jones 3.1 or good (compared to Cranmer's rating of 1.8 or unsatisfactory). On the 20 individual factors, Durham rated Jones d. or next to the best on 4, c. or middling on 15, and b. or next to worst on only 1. Some comparative examples from the two appraisals follow.

Productivity: Durham -- Handles about the normal work load

Cranmer -- Tends to be a bottleneck in getting the work out.

Quality of Work: Durham -- Quality of work is about the same as that of most employees of this grade and type of work

Cranmer -- His work frequently contains an unacceptable percentage of error or shows evidence of poor judgment.

Attempts to Improve: Durham -- Quite often goes out of his way to improve his skills or knowledge

Cranmer -- Content to drift; generally unresponsive to efforts to help him develop.

Capacity for Development: Durham -- Has more than usual potential for development.

Cranmer -- Potential for development rather limited.

Attendance and Punctuality: 8/ Durham -- Takes a usual amount of time for breaks; requests leave in advance, but isn't much concerned about the effect his leave will have on the workload.

Cranmer -- Takes longer or more frequent breaks than most; tends to take advantage of leave privilege.

Cranmer's written comments attached to Jones' appraisal are so critical that it would be difficult to conceive how she ever became a government employee.

8/ This is the only factor in which both were relatively close.

According to Cranmer, he showed his rating of her to Jones on November 12, 1970, and offered to discuss it with her but she would not do so. On November 13, 1970, Cranmer sent Jones a memorandum offering her again the opportunity to discuss her professional appraisal with him, and if she thought it was unfair to discuss it with Dr. Durham. She did not answer, and Cranmer's appraisal of Jones was approved by Durham on November 20, 1970. Jones, admittedly, showed her appraisal to people in the laboratory and complained bitterly of it. This prompted a memorandum from Cranmer dated November 24, 1970, criticizing her for using her appraisal as a means of causing trouble, and that such comments as, "Dr. Durham and Dr. Cranmer are both going to be sorry" for rating her poorly were consistent with her attitude. Cranmer warned in the memorandum that he would document such comments.

Aside from Durham's appraisal of Jones, management voiced other opinions which appear to be inconsistent with Cranmer's appraisal of November 1970. In June 1970, Cranmer gave Jones a satisfactory rating with respect to civil service requirements. Another indication by management of her worth is indicated by the responses to her request for a transfer in August 1970 to a vacancy in the training section of the laboratory headed by Dr. Richardson. Dr. Richardson wrote to Jones on August 14, 1970, thanking her for her application. He stated further that he would be happy to have her, but that she had done a commendable job in her present position and the potential in the library was greater. He concluded, however, that he would initiate the transfer, if agreeable to Drs. Durham and Cranmer. Durham turned her down on the transfer, and in his memorandum to Mrs. Jones, dated August 21, 1970, 9/ he stated, "I hope that you will continue to carry out your work in the library with the same degree of interest and enthusiasm which you currently display." Jones again applied for a transfer to the training section during the period of her difficulties with Cranmer, but Cranmer testified that he would not recommend it since the job required a lot of typing and he did not think Jones was qualified.

Mrs. Jones did appeal the appraisal to the Civil Service Commission. But, the appraisal was an agency form not appealable to Civil Service. Respondent indicated that there was some confusion as to whether there was an agency grievance procedure in existence. At any rate, neither of the parties are contending that there is an established grievance or appeals procedure within the meaning of Section 19(d) of the Order making such procedure the exclusive procedure for resolving the Complaint.

(h) Further criticism for tardiness, Cranmer's memorandum of February 3, 1971

9/ The record, at page 91, lists the date of this memorandum to be October 21st." It is hereby corrected to read, "August 21st."

The record reveals another memorandum from Cranmer to Jones concerning tardiness, dated February 3, 1971. He stated in the memorandum that in the past three weeks she was tardy on five occasions. He specifically noted three occasions, (1) a morning when her husband called in about a flat tire on her car; (2) the morning she required the attention of Dr. Edmundson; and (3) Friday, January 29. The memorandum noted that the required procedure was for her to call in, not her husband, as it was necessary to have an estimate of the time she would be delayed.

With respect to the three occasions specified in the memorandum, Mrs. Jones explained that on the first occasion noted, she had a flat tire and she told her husband to call the laboratory and explain that she was having a tire repaired. She testified that in the past when emergencies arose her husband often called in for her, and she had never been questioned about this practice. The second occasion was when she took a new form of medication, and became dizzy. In fact Cranmer called a doctor to visit her. On the third occasion, a door into the laboratory which she normally used was locked. This required her walking around the building to another entrance which made her two or three minutes late.

(i) Cranmer's meeting with Delisle, National Representative, AFGE

On January 13, 1971, by prearrangement with Durham, James De Lisle, a National Representative for American Federation of Government Employees met with Durham and Jones in Durham's office to discuss the unfair labor practice charge. Cranmer was not present. After the meeting with Durham, De Lisle and Jones proceeded to the library, where Cranmer met them, and asked to speak to Jones in his office. Jones refused to speak to him without De Lisle's presence. Cranmer then asked De Lisle to see him in his office. De Lisle proceeded to Cranmer's office accompanied by Mrs. Jones. Cranmer was very angry and spent several minutes complaining about Jones' alleged shortcomings. The conversation became very heated and in fact the two men went into the hall where others had to separate them. According to De Lisle, Cranmer ended the conversation by saying, "I'm sick of this Mickey Mouse union business, and it's not going to interfere with my, uh, running my job." Dr. Cranmer admitted using the term, "Mickey Mouse," but stated that he had said, "Mickey Mouse issues continuing to require union intervention." Later, Cranmer apologized to De Lisle for his attitude, and both men shook hands.

(j) Cranmer sets procedures for union activities on laboratory time, Cranmer's Memorandum of February 1, 1971.

On February 1, 1971, Cranmer issued a memorandum to Jones setting forth a standard operating procedure for requesting laboratory time for union activities. Dr. Durham testified that Cranmer was not in charge of labor relations in the laboratory, and that he did not ask Cranmer to prepare such a memorandum. He surmised that since Jones was president of the union and Cranmer was her supervisor, Cranmer probably felt it was his obligation to set up rules for union meetings.

(3) Discouragement of Membership in the Complaint

There was considerable testimony offered by the Complainant, apparently to show actual discouragement of membership in and activity on behalf of the Complainant caused by Cranmer's alleged discrimination against Jones. Various witnesses testified that the Complainant historically held meetings in the library during the noon lunch period but since September 1970 no such meetings have been held. They attributed this to fear engendered by Cranmer's actions. Further, there was testimony that employees were afraid to join the Complainant or run for office in the Complainant because of Cranmer's actions. However, there was no direct testimony by any employees that they were frightened off from engaging in such activity by Cranmer. The only such evidence presented was testimony that various unnamed employees, some of whom were "annual handlers," had indicated to another employee a fear of being identified with the Complainant.

Conclusions

Outlined above are numerous actions taken by Dr. Cranmer against Mrs. Jones. The Respondent argues that Dr. Cranmer's actions were not precipitated by Mrs. Jones' activities as president of the Respondent, rather they were actions which were justified because of Mrs. Jones' performance.

It is apparent from the record that Mrs. Jones had no training in library science, and that as a GS-4 clerk, she could not be expected to operate the library as desired by the professionals. It was for the very reason that there was much to be desired in the library that Dr. Durham shifted supervision of the library from himself to Dr. Cranmer in April 1970. In May 1970, Dr. Cranmer outlined in writing what was expected of Jones. He testified that he was unhappy with her performance

from the time he took over, and that she often came in late, as much as 15 minutes, and left early, as much as 15 minutes. But, until September 1970, although Dr. Cranmer testified that he admonished her orally, there were no written disciplinary memoranda issued to Mrs. Jones by Dr. Cranmer, there were no assessments of leave without pay against Mrs. Jones, and in June 1970, she was given a satisfactory rating on the annual rating required by the Civil Service Commission. After September 1970, Mrs. Jones was plastered with disciplinary memoranda, was kept to a rigid time schedule (not permitting even a minute or two deviation), was docked for slight deviations which were in the main satisfactorily explained by Mrs. Jones, and was given a performance appraisal by Dr. Cranmer which his superior Dr. Durham characterized as the lowest ever in the laboratory.

In September 1970 Mrs. Jones intervened in the administrative leave problem which was bothering Dr. Cranmer's timekeeper. Certainly such intervention at the request of a member of the unit by a local union president, is legitimate union activity by the president. That Dr. Cranmer was upset by Mrs. Jones' intervention is apparent as indicated by his interview with Mrs. Jones on September 25, 1970. He accused her of being the "focal point" of the troublemakers. (It was natural for her to be a "focal point" as she was president of the Union and the trouble he was referring to was obviously trouble concerning the administrative leave of Miss Spiegel which Mrs. Jones raised in her position as local president.) He then threatened her with loss of employment if she didn't follow his instructions precisely. It was from this point that Cranmer's memoranda to Jones and other actions against her started to flow.

A written warning was sent to Mrs. Jones by Dr. Cranmer on October 1, 1970, because she was out of the library from 11:35 a.m. to 12:05 p.m. that day and the normal lunch schedule for the laboratory was 12 noon to 12:30 p.m. Yet, it is undisputed that Mrs. Jones took her lunch from 11:30 to 12 noon from the time she first was employed by the laboratory. While on May 12, 1970, Dr. Cranmer advised her that she was to follow a rigid schedule, he did not tell her that she had to change her lunch period. She continued her own lunch schedule with no criticism from Dr. Cranmer until after the interview on September 25, 1970. (His criticism allegedly was based on the necessity of having somebody in the library to serve its patrons. Yet, at this time, there was a part-time trained librarian employed who theoretically was suppose to be in the library 8:00 a.m. to 1:30 p.m.)

Respondent evinced a great concern over Mrs. Jones' leave record. Her leave problem arose from an extended absence in 1969 for a cancer operation. This absence not only dissipated her sick leave but leave was advanced to her. As a result all leave taken after her

return from her operation was annual leave. While the contention was made that she was abusing her leave, there was no evidence actually presented by Respondent showing excessive absence since her return from her operation, nor was any comparison made of her leave record with that of other employees. On October 1, 1970, she obtained permission from Dr. Cranmer for one hour annual leave because of a bad toe and other problems. She engaged in a conversation with the timekeeper and let slip that she was going to call a union representative. Certainly there is nothing inconsistent with making a telephone call while out ill. Because of advice from the timekeeper, Dr. Cranmer wrote Mrs. Jones the memorandum seeking proof of illness for just one hour taken. Not being satisfied with her oral explanation (admittedly Mrs. Jones was a bit sarcastic, but understandably so under the circumstances) he took the extreme step of docking her one hour leave without pay. Nobody else in the laboratory was ever docked under similar circumstances, and while Mrs. Jones was characterized as a chronic offender, she had never previously been criticized for taking improper leave.

Mrs. Jones' next problems arose over the typing of manuscripts. Of course there was nothing discriminatory about assigning typing work to her. However, the various memoranda received from Dr. Cranmer about her performing work out of order, appear to be unjustified. Dr. Cranmer had constantly stressed that her prime duty was to serve in the library. Yet, one memorandum was prompted when she was preparing reprints for mailing at the request of Dr. Durham's secretary (an important service of the library). Another memorandum was prompted by the fact that Mrs. Jones gave up part of her lunch period to work on a short manuscript for another doctor at the laboratory.

Next in Cranmer's program of restrictions and disciplinary memorandum was a memorandum of October 16, 1970, replying to a memorandum from Mrs. Jones. In this memorandum because of language used by Mrs. Jones concerning an anticipated letter of admonishment he accused her of improperly looking at material in his desk or Mrs. Hickerson's desk. He then restricted her movements when she arrived at work before 8 a.m., and remained at the laboratory after 4:30 p.m. to the library, Xerox room, reception area or ladies room. This, in my opinion, is a serious restriction on a union president especially where the accusations of improper reading of private matter was mere surmisal and unsubstantiated. No other employee was ever so restricted with respect to non-working time.

The next memorandum to Mrs. Jones was Dr. Cranmer's requirement of October 19, 1970, that she take one hour annual leave if not on duty at 8 a.m. and another hour if not at work at 9:00 a.m. No other employee was ever so restricted. On October 20, 1970, even accepting Dr. Cranmer's testimony, she was only a few short minutes late at her desk.

(Mrs. Jones, substantiated by Mrs. Elwert, testified that she was in the building before 8 a.m., but she and Mrs. Elwert, following custom, stopped for coffee at the office coffee pot.) For this minimal tardiness he sent her a memorandum docking her one hour leave without pay because she did not sign an annual leave slip. Thereafter when she returned to her desk two or three minutes after 9:00 a.m., after she discussed the problem with the laboratory chief, Dr. Cranmer sent her a second memorandum docking her an additional hour. This, notwithstanding that he never docked her for tardiness prior to September 25, 1970, when she allegedly was late as much as 15 minutes.

More serious in Dr. Cranmer's program against Mrs. Jones is the performance appraisal he gave her in November 1970. It is inconceivable that she could have been that bad, taking into consideration her performance as a government employee for 15 years, Dr. Durham's appraisal, and the fact that Dr. Cranmer, himself, rated her as satisfactory in June 1970. (Interestingly, Dr. Cranmer testified that Mrs. Jones has now improved and he probably would rate her higher now.)

The final memorandum to Mrs. Jones concerning her tardiness was the one of February 1971, when he pointed to the three instances discussed above. As noted, Mrs. Jones had valid explanations, which under normal circumstances should have been accepted.

Dr. Cranmer contended that he was rigid on punctuality for all of his employees and testified that he admonished other employees. However, these were oral admonishments on an occasional basis. There was evidence that he gave only one other employee a one time written memorandum for tardiness. But, this was on an occasion when he gave Mrs. Jones a written memorandum and the employee was seen by Mrs. Jones to enter the laboratory after she did.

Dr. Cranmer testified that he had no animus against unions and that his grandfather had been very active in a union. However, his cavalier attitude toward the local at the laboratory and Mrs. Jones as president, aside from his actions discussed above, is well illustrated by his discussion with Mr. DeLisle, a national union representative, where he either characterized the union as a "Mickey Mouse" union or the issues raised by the union as "Mickey Mouse" issues. Further, he took it upon himself to issue a memorandum to Mrs. Jones regulating union activities, when labor-management relations at the laboratory were not within his purview.

While a supervisor may admonish and discipline an employee for infractions, under the circumstances of this case I conclude that the excessive number of memoranda issued to Jones for relatively minor

infractions, or in some instances no infractions, the restrictive rules applied only to Mrs. Jones, the "docking" of Mrs. Jones' pay and the low personnel appraisal of Mrs. Jones' affecting her promotion opportunities, all coming after Mrs. Jones, as president of the Complainant, intervened in the administrative leave incident, were acts of harassement and intimidation prompted by Mrs. Jones' activity as president of the Complainant. 10/ This conclusion is especially warranted when consideration is given to the fact prior to Jones' intervention on the administrative leave matter in September 1970, no such actions were taken against Jones even though Cranmer testified that her short comings were apparent way before September 1970.

Section 19(a)(1) of the Order makes it an unfair labor practice for agency management to interfere with, restrain, or coerce an employee in the exercise of the rights assured by the Order. Section 1(a) of the Order spells out these rights assuring that each employee "* * * has the right, freely and without fear of penalty or reprisal, to join, and assist a labor organization." Especially applicable to Mrs. Jones, as president of the Complainant, is a further clause in Section 1(a) providing "* * *, 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." Accordingly, I conclude the discriminatory actions taken against Mrs. Jones, described above, constituted interference with, restraint, or coercion within the meaning of Section 19(a)(1) of the Order.

Section 19(a)(2) of the Order 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. Clearly the docking of her pay and her low performance appraisal constituted discrimination against Mrs. Jones with respect to her opportunities for promotion and other working conditions. As for discouragement of membership in a labor

10/ With respect to the grievances filed by Mrs. Jones with the Laboratory Director seeking remedies for the deductions from her pay caused by Cranmer placing her on leave without pay status and for the poor performance appraisal given her by Cranmer, I do not conclude that the Respondents failure to act on these grievances was violative of the Order. Unlike the cases in which the Assistant Secretary found that the failure to process grievances was violative, there was no negotiated grievance procedure in existence in the instant case. See Veterans Administration Hospital, Charleston, South Carolina, A/SLMR No. 87; United States Army School Training Center, Fort McClellan, Alabama, A/SLMR No. 42. Moreover, the parties were in doubt as to whether there was an established agency grievance procedure in existence at the time because of the pending of the transfer of the laboratory to the Environmental Protection Agency.

organization, the Complainant's evidence of actual discouragement was inconclusive. However, it is not necessary to the finding of a violation of Section 19(a)(2) that there be proof of actual discouragement. The gravamen of Section 19(a)(2) is that the discrimination would tend to discourage membership in a labor organization. Accordingly, I conclude that by discriminatorily withholding 3 hours pay from Mrs. Jones and by discriminatorily issuing her a low performance appraisal, the Respondent also violated Section 19(a)(2) of the Order.

The Remedy

Having concluded that Respondent has engaged in certain conduct prohibited by Section 19(a)(1) and (2) of Executive Order 11491, I shall recommend that the Assistant Secretary order the Respondent to cease and desist therefrom and take specific affirmative action, as set forth below, designed to effectuate the policies of the Order.

RECOMMENDATIONS

In view of my findings and conclusions above, I make the following recommendations to the Assistant Secretary:

A. That Respondent's pre-hearing motion to dismiss be denied;

B. That allegations in the Complaint of violations of the Order by the failure of Respondent to process grievances of Mrs. Phyllis A. Jones be dismissed; and

C. Having found that the Respondent has engaged in certain conduct prohibited by Section 19(a), subsections (1) and (2) of Executive Order 11491, it is my considered judgment that it would be appropriate for the Assistant Secretary to adopt the following order which is designed to effectuate the policies 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 Environmental Protection Agency, Perrine Primate Laboratory, shall:

1. Cease and desist from:

(a) Discouraging membership in the American Federation of Government Employees, AFL-CIO, Local 3162, or any other labor organization, by discriminatorily issuing unsatisfactory performance appraisals to employees and by discriminatorily placing employees on leave without pay status, or otherwise discriminating in regard to hire, tenure, promotion or other conditions of employment.

(b) Issuing discriminatory disciplinary warnings to employees.

(c) Issuing discriminatory memoranda restricting privileges of employees with respect to freedom of movement within the laboratory on non-working time.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Section 1(a) of Executive Order 11491.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Order:

(a) Reimburse Mrs. Phyllis A. Jones for three hours pay withheld by discriminatorily placing her on leave without pay status on October 1 and October 20, 1970.

(b) Expunge from Mrs. Phyllis A. Jones' personnel records the unsatisfactory performance appraisal given her in November 1970.

(c) Expunge from Mrs. Phyllis A. Jones' personnel records discriminatory disciplinary warnings, and memoranda discriminatorily restricting her freedom of movement in the laboratory on non-working time.

(d) Post at its facility at the Perrine Primate Laboratory, Perrine, 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 of the Perrine Primate

Laboratory 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 Laboratory Director 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 ten (10) days from the date of this Order as to what steps have been taken to comply herewith.

Henry L. Segal
Hearing Examiner

Dated, Washington, D. C.
November 23, 1971

APPENDIX

(NOTICE RECOMMENDED FOR ADOPTION BY THE ASSISTANT SECRETARY)

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

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT discourage membership in the AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 3162, or any other labor organization, by discriminatorily issuing to employees unsatisfactory performance appraisals and by discriminatorily placing employees on leave without pay status, or otherwise discriminating in regard to hire, tenure, promotion or other conditions of employment.

WE WILL NOT issue discriminatory disciplinary warnings to employees, and discriminatory memoranda restricting privileges of employees with respect to freedom of movement in the laboratory on non-working time.

WE WILL reimburse Mrs. Phyllis Jones for three hours pay withheld by discriminatorily placing her on leave without pay status on October 1 and October 20, 1970.

WE WILL expunge from Mrs. Phyllis Jones' personnel records the unsatisfactory performance appraisal given her in November 1970.

WE WILL expunge from Mrs. Phyliss Jones' personnel records discriminatory disciplinary warnings and memoranda discriminatorily restricting her freedom of movement in the laboratory on non-working time.

WE WILL NOT in any like or related manner interfere with, restrain or

coerce our employees in the exercise of their rights assured by Section 1(a) of Executive Order 11491.

PERRINE PRIMATE LABORATORY
Perrine, Florida
(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 of the Labor-Management Services Administration, U. S. Department of Labor, whose address is Room 300, 1371 Peachtree Street, N. E., Atlanta, Georgia 30309

February 29, 1972

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

UNITED STATES DEPARTMENT OF AGRICULTURE,
AGRICULTURAL STABILIZATION AND
CONSERVATION SERVICE
A/SLMR No. 137

This case arose as a result of the National Federation of Federal Employees (Ind), LU 1633 (NFFE) filing objections alleging that certain conduct by the Activity affected the results of an election held at the United States Department of Agriculture, Agricultural Stabilization and Conservation Service.

A hearing was held before a Hearing Examiner involving the NFFE's objection concerning alleged statements and conduct by named supervisors in the presence of employees which allegedly affected the results of the election.

Upon review of the Hearing Examiner's Report and Recommendations, the Assistant Secretary found, in agreement with the Hearing Examiner, that a shift supervisor's statement on the day prior to the election that she would escort everyone to the polls and make sure they voted, and her statement to two employees in the presence of approximately 30 employees that if they worked half as hard on the job as they did for the union, they would both be in higher grades, improperly affected the results of the election as such conduct constituted an interference with the voting process. He found also that the shift supervisor's entering the polling area and questioning election officials concerning an employee's ballot in the presence of other employees constituted additional improper involvement in the voting process and warranted the setting aside of the election and the direction of a second election.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF AGRICULTURE,
AGRICULTURAL STABILIZATION AND
CONSERVATION SERVICE

Activity

and Case No. 60-2151(RO)

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES (Ind), LU 1633

Petitioner

DECISION ON OBJECTIONS
AND
DIRECTION OF SECOND ELECTION

On September 30, 1971, Hearing Examiner Rhea M. Burrow issued his Report and Recommendations in the above-entitled proceeding finding that the United States Department of Agriculture, Agricultural Stabilization and Conservation Service, herein called the Activity, has engaged in a pattern of improper conduct which persuaded or influenced employees from not exercising their freedom of choice in voting in the election. In these circumstances, the Hearing Examiner concluded that the employees' freedom of choice had been impaired, and accordingly, recommended that the election held on December 9, 1970 be set aside and a new election be directed.

The Assistant Secretary has reviewed the rulings of the Hearing Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed except as modified herein. 1/ Upon consideration of the Hearing Examiner's Report and Recommendations and the entire record, including the Activity's request for review of the Hearing Examiner's Report and Recommendations and the parties' briefs, 2/ I adopt the findings and recommendations of the Hearing Examiner except as modified herein. 3/

1/ At the hearing, the Activity sought to exclude evidence relating to alleged improper conduct of employees William Gilliland and Eugene Kalewi on the ground that the allegations as to their conduct were not part of the original objections and, thus, were raised untimely at the hearing. The Hearing Examiner found that until the status of Gilliland and Kalewi was determined, testimony regarding their conduct was relevant to the objection under consideration. I reject the Hearing Examiner's reasoning inasmuch as the objections filed by the National Federation of Federal Employees, (Ind), LU 1633, herein called the NFFE, named specific individuals who allegedly engaged in improper conduct, and made no mention of any alleged improper conduct by Gilliland and Kalewi. Because Gilliland and Kalewi were not named specifically in the objections herein, I find that allegations concerning their conduct were not properly before the Hearing Examiner and should not have been considered. Accordingly, the Activity's motion to exclude testimony relating to Gilliland and Kalewi is hereby granted.

Also, the Activity's motions to dismiss the objections based on the NFFE's alleged lack of an adequate showing of interest to process a petition and on an alleged inconsistency in the Order and the Assistant Secretary's Regulations concerning the determination of majority status are hereby denied.

2/ In its brief, the NFFE argues that there should not have been a hearing in this matter and that the election herein should have been set aside and a new one conducted inasmuch as the Regional Administrator had found "merit" with respect to one of its objections. I conclude, from a careful reading of the Regional Administrator's Report and Findings with respect to objection 5, that the seeming inconsistency of his finding "merit" to the objection, while at the same time finding that a relevant question of fact existed, can be explained as being essentially an expression of evaluation as to the sufficiency of the evidence submitted in support of the allegation. Thus, the Regional Administrator, in effect, concluded that the objection had "merit" to the extent that it raised a relevant question of fact and, therefore, warranted the issuance of a notice of hearing.

3/ In the circumstances, I do not adopt footnote 23 of the Hearing Examiner's Report and Recommendations, which referred to another Hearing Examiner's conclusion that a consent election agreement, under certain circumstances, is final and binding, to the extent that it is inconsistent with my decision in Department of the Army, Army Materiel Command, Automated Logistics Management Systems Agency, A/SLMR No. 113. Nor do I adopt the Hearing Examiner's findings concerning the Activity's alleged violations of Section 19 of the Order as I view such findings to be irrelevant and immaterial in a representation matter.

The NFFE alleges that on the day of the election herein Maezel Baehr, a known supervisor, personally escorted a new employee into the voting room and caused a disturbance when the employee's ballot was challenged on a tenurial basis. It alleges further that on the day of the election Baehr "continued her wrath on other employees."

The evidence establishes that shift supervisor Baehr, on the day prior to the election, stated to employees that she would escort everyone (in her section) to the polls and make sure they voted and, in the presence of approximately 30 employees, she stated to employees Brockman and Herr that if they worked half as hard on the job as they did for the union, they would both be in higher grades. The record reveals further that on the day of the election, Mrs. Baehr escorted 2 or 3 employees to the polls, entered the voting area with one employee, and questioned why his vote was challenged, stating in the presence of approximately 15 persons that she was "going to Personnel to see what she could do about it." Also, on the afternoon of the day of the election, the record reveals that she stated, in a loud and excited manner, in the presence of employees in her own section and those in an adjoining section, that she was "going to start a war of /her/ own."

The Hearing Examiner found that both on the day prior to the election and on the election day, Baehr's remarks and conduct in the presence of numerous employees had the effect of discouraging employees from exercising their rights, freely and without fear of penalty or reprisal, to form, join or assist a labor organization. He reasoned that a known supervisor's presence in the voting area during an election in other than an official capacity was improper in the absence of compelling reasons or circumstances justifying such presence and, in this latter regard, he found that the evidence in this case did not show any justifiable reasons or circumstances for Baehr's presence in the voting area. 4/

In its request for review of the Hearing Examiner's Report and Recommendations, the Activity asserted that the Hearing Examiner "magnified the incidents testified to all out of proportion when he concluded that a few incidents established a 'pattern of improper conduct' or created an 'overall atmosphere of fear.'" In the circumstances, the Activity was of the view that the Hearing Examiner's findings and recommendations should be rejected on the basis that the evidence failed to show that management coerced or intimidated employees.

4/ Insofar as the Hearing Examiner implies that a supervisor may be present in the voting area in an "official capacity" see the Procedural Guide for Conduct of Elections Under Supervision of the Assistant Secretary Pursuant to Executive Order 11491 which states, in effect, that authorized observers will be selected from among nonsupervisory employees of the Federal Government.

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The Procedural Guide for Conduct of Elections Under Supervision of the Assistant Secretary Pursuant to Executive Order 11491 states that,

> "Neither supervisors, managerial employees, nor labor organization officials should be in or near the polling place while the election is being conducted. Only official observers and voters may be in voting places during the election."

The above language reflects a policy which I have adopted to provide, to the greatest possible extent, conditions which would enable employees voting in a representation election to register a free and untrammeled choice for or against a labor organization seeking to represent them. In my view, shift supervisor Baehr's entering the voting area and questioning election officials concerning an employee's ballot in the presence of other employees constituted an improper interference in the voting process and necessarily affected the employees' freedom of choice in the election. Moreover, I find that Mrs. Baehr's conduct on the day before the election and her additional action on the day of the election, which occurred in the presence of numerous employees, improperly affected the results of the election and required that it be set aside and a second election directed.

The NFFE's objection also alleged that the remarks and/or conduct of Art Loehr, Victor L. Mahan, Mr. Whalen and Mr. Schwaab contributed to the disturbance and decomposure of the voting atmosphere. 5/ The NFFE failed to present evidence in support of this allegation. The Hearing Examiner concluded correctly that in the circumstances, the alleged remarks and actions attributed to the above four employees were permissible expressions of opinion of rank and file employees. Accordingly, I find that the NFFE objections in this regard are without merit and are hereby overruled.

Also, the NFFE alleged certain conduct by Mr. Leo Pete, whose ballot was challenged on the basis of supervisory status, contributed to the disturbance and decomposure of the voting atmosphere. In this connection, I adopt the Hearing Examiner's finding that Pete was not a supervisor within the meaning of the Order. Accordingly, because the alleged remarks or actions attributed to him were permissible expressions of a rank and file employee the objection in this regard is overruled.

5/ The record discloses that the challenges to the ballots of Mahan, Whalen and Schwaab were withdrawn and their ballots counted. Loehr's ballot was not challenged.

In summary, having sustained the NFFE's objection with respect to the conduct of shift supervisor Maezel Baehr, the election conducted on December 9, 1970 is hereby set aside and a second election will be conducted as directed below. 6/

DIRECTION OF SECOND ELECTION

It is hereby directed that a second election be conducted as early as possible, but not later than 45 days from the date below, in the unit set forth in the Election Agreement dated November 24, 1970. The appropriate Area Administrator shall supervise the election subject to the Assistant Secretary's regulations. Eligible to vote are those in the unit who are employed during the payroll period immediately preceding the date below, including employees who did not work during the period because they were ill, on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

Dated, Washington, D.C.
February 29, 1972

W.J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

6/ In view of my decision to set aside the election and because the evidence in the record is insufficient to reach a determination as to the finding of the Hearing Examiner with respect to the supervisory status of Tom Warren and Bill B. Boyel, I find it unnecessary to rule upon that portion of the objection regarding these individuals' alleged improper conduct.

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

UNITED STATES DEPARTMENT OF AGRICULTURE AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE

Activity

CASE NO. 60-2151 (RO)

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES (Ind.)
LU 1633

Petitioner

BEFORE:

Rhea M. Burrow, Hearing Examiner

APPEARANCES:

G. H. Penstone, Regional Attorney
U. S. Department of Agriculture
8930 Ward Parkway
Kansas City, Missouri 64116

For the Agency-Activity

Irving I. Geller, General Counsel
National Federation of Federal Employees
1737 "H" Street, N. W.
Washington, D. C. 20006

For the Petitioner

REPORT AND RECOMMENDATIONS ON OBJECTION TO ELECTION

STATEMENT OF THE CASE

This proceeding was heard at Kansas City, Missouri on July 7, 8, and 9, 1971. It arose pursuant to a Notice of Hearing on Objections issued on April 8, 1971 by the Regional Administrator for the Kansas City, Missouri, Region under the authority of Executive Order 11491 (herein called the Order) and pursuant to section 202.20(d) of the Rules and Regulations of the Assistant Secretary for Labor Management Relations (herein referred to as the Assistant Secretary).

The issue heard concerns one of several objections made by the National Federation of Federal Employees Local Union No. 1633 (herein referred to as NFFE), in its petition filed on December 14, 1970 against the United States Department of Agriculture Agricultural Stabilization Service (herein referred to as the Activity) to an election held on December 9, 1970 for certification as the exclusive bargaining agent for certain employees at the Activity's place of business. The NFFE was the only labor organization involved in the election and failed to receive a majority of the votes cast. All parties were represented at the hearing by counsel, who were given full opportunity to adduce evidence, examine and cross-examine witnesses, submit arguments and submit briefs.

Upon review of the entire record, including observations of the witnesses and after due consideration of the briefs filed by the Activity and NFFE, the Hearing Examiner makes the following

FINDINGS AND CONCLUSIONS

I

NFFE OBJECTIONS TO THE ELECTION

A. THE ELECTION

Pursuant to an election agreement signed on November 19, 1970 and approved by the Area Administrator on November 24, 1970, a secret ballot was conducted in accordance with the provisions of Executive Order 11491 in the following unit of the Activity's employees

> All Non-Supervisory General Schedule and Non-Supervisory Wage Grade employees including Part Time, Temporary, Intermittent, and Seasonal employees who are employed by the U. S. Department of Agriculture Agricultural Stabilization and Conservation Service, with official duty station at 8930 Ward Parkway, Kansas City, Missouri.

The election was scheduled to be held in the Activity's second floor Conference Room on December 9, 1970 from 7:00 A.M. to 5:00 P.M. with counting of the ballots to begin at 5:15 P.M. The agreement provided that "Managerial supervisory, any employees in Personnel work other than in a purely clerical capacity, guards, and Professionals" would be excluded from voting.

The results of the election held on December 9, 1970 were as follows:

Number of eligible voters	697
Void ballots	0
Votes cast for Petitioner Local 1633 (NFFE)	207
Votes cast against Exclusive Recognition	259
Valid votes counted	466
Challenged ballots	36
Valid votes plus challenged ballots	502

Challenges were not sufficient in number to affect the results of the election.

B. THE OBJECTION NOTED FOR HEARING

On December 14, 1970 the NFFE filed some nine timely objections to the conduct on the part of the Activity alleged to have affected the results of the election. Thereafter, the NFFE objections to the election were investigated by the Regional Administrator who issued a report finding that one objection (No. 5) by the NFFE raised ". . . a relevant issue of fact which may have affected the results of the election," and that a Notice of Hearing on the objection would be issued, absent a timely filing of a request for review. It was further concluded that no improper conduct occurred affecting the results of the election with respect to the other eight objections. There was no appeal from the findings and conclusions of the Regional Administrator and on April 8, 1971 he issued a Notice of Hearing and directed that a hearing be conducted on the following NFFE objection No. 5:

> "Listed below are employees who caused a disturbance at different times during the day. These disturbances occurred both at the polls and throughout the building. The Department of Labor allowed these people to remain at and around the polls forcing their views and opinions on other voters.
>
> "Maezel Baehr personally escorted a new employee into the voting room and caused a distinct commotion when his vote was challenged on a proper tenurial basis. Since Maezel Baehr is a known supervisor it is certain

> that her agitation influenced the voters present. She did not stop there but continued her wrath on other employees several times during the day.
>
> "Tom Warren, job scheduler, stated that the union was comprised of lazy misfits who could not get ahead on their own and need an organization to do it for them. This was a direct effort to solicit negative votes. According to the record his vote was challenged but he told other employees it was not challenged.
>
> "Mr. Whalen spent at least five minutes in front of approximately ten to fifteen witnesses questioning the challenge to his vote. When he returned to his working area he openly campaigned for negative votes by telling fellow employees how unfair the union had been in challenging his vote. He also stated that if the union won he would start a petition to protest the election.
>
> "Art Loehr accosted several employees in the coffee shop and made vulgar remarks concerning both them and the union. He stated that only communists would allow themselves to be involved with unions. In doing this his language and manner were atrocious, certainly not becoming to a federal employee.
>
> "Others who contributed to the disturbance and decomposure of the voting atmosphere were Bill Boyel, Mr. Mayhen, Mr. Schwaab, and Mr. Leo Pete." 1/

II

PROCEDURAL ISSUES AND MOTIONS

It is deemed appropriate here to refer to certain preliminary matters and motions raised by the Activity and NFFE before further discussion of the substantive issue. After the Regional Administrator had investigated and issued the Report and Objections on Findings on March 19, 1971, counsel for the Activity indicated that it was his intention to file a motion with the Hearing Examiner to have the showing of interest available at the trial. He was advised on June 29, 1971 as follows: "You recognize the

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1/ Later investigation which was substantiated at the hearing revealed that the correct name and spelling for Bill Boyle was Bill B. Boyel and for Mr. Mayhen, Victor L. Mahan and each will hereafter be referred to with corrected spelling.

existence of section 202.2(e)(3) of the Assistant Secretary's Regulations which provide in part . . . the showing of interest submitted with the petition shall not be furnished to any of the parties or organizations listed in the petition. In view of this strict limitation, I can see no useful purpose served by having a copy of interest in the hands of the Hearing Examiner. Whether or not some one whose name appears on that showing of interest is a possible supervisor is totally immaterial and irrelevant at this time. (See 202.2(b) of the Regulations). . ." 2/

The motion was renewed at the hearing at which time the Activity moved to dismiss the complaint on the basis that (1) the NFFE showing of interest in excess of 30% included management and/or supervisory personnel who are now claimed by the union to have been ineligible to vote; and (2) that there is conflict in the requirements of section 10 of Executive Order 11491 providing that in order for a union to be certified it must be selected in a secret ballot by a majority of the employees in an appropriate unit as their representative and regulation 29 CFR 202.17(c) which states only a majority of the votes cast. 3/

The Activity also moved to exclude any evidence that might be offered by NFFE relating to alleged remarks, disturbance

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2/ 29 CFR 202.2(f). "The Area Administrator shall determine the adequacy of the showing of interest administratively, and such decision shall not be subject to collateral attack at a unit or representation hearing. Any party challenging the validity of showing of interest must file his challenge with the Area Administrator within ten (10) days after the initial date of posting of the notice of petition as provided in §202.4(b) and support his challenge with evidence. The Area Administrator shall investigate the challenge and report his findings to the Regional Administrator who shall take such action as he deems appropriate."

3/ Section 10, Executive Order 11491, "Exclusive recognition (a) An agency shall accord exclusive recognition to a labor organization when the organization has been selected, in a secret ballot election, by a majority of the employees in an appropriate unit as their representative."

29 CFR 202.17(c) provides, "All elections shall be by secret ballot. An exclusive representative shall be by a majority of the votes cast."

or loud and angry conversation made by any individuals at or near the polling place or any other type of improper conduct at or near the polling place claimed to have been improper or calculated to have influenced voters because authorized agents or observers for the NFFE had certified that the balloting at the election was fairly conducted and it should not now be permitted to repudiate the certificate of its agents and to contend that the balloting was not properly conducted.

I reserved ruling on the motions to dismiss for the Assistant Secretary noting that under the Rules and Regulations I could only make recommendations with respect to disposition of a case. I also informed the parties that I would pass or make recommendations on the motion to exclude evidence relating to remarks, loud or noisy conversation and other disturbances at or near the polling place when I entered my decision with recommendations to the Assistant Secretary. The Activity's motion to exclude evidence as to eight of the persons whose conduct the union objected to on the basis that they were regular employees who had the right to speak out, rather than supervisory employees, was denied; this was considered an assumption dependent on proof to be established.

The NFFE objected to the ruling of the Hearing Examiner requiring it to proceed and put on its proof first in the case because the Regional Administrator had ruled in its Report and Findings on Objections that improper conduct had occurred affecting the results of the election which shifted the burden of proof. 4/ The Notice of Hearing on Objections specified only that certain of the objections raised a relevant issue of fact which may have affected the results of the election. This did not alter the responsibility of the NFFE from carrying its burden of proof to establish the improper conduct alleged and that the results of the election had been affected by improper conduct of the Activity. The fact that the objection was ordered to hearing by the Regional Administrator is an indication that he did not consider that the issue had previously been determined. In any event, 29 CFR 202.20(d) is controlling in the matter and it provides: ". . . The objecting party shall bear the burden of proof regarding all matters alleged in its objections to conduct affecting the results of the election."

4/ The Notice of Hearing on Objections by the Regional Administrator, dated April 8, 1971, is as follows: "On March 19, 1971 the undersigned issued his Report and Findings on Objections copies of which were served on all parties, finding that certain of the objections raise a relevant issue of fact which may have affected the results of the election and Notice of Hearing on Objections would issue."

I am bound in my findings by the Executive Order and the Regulations of the Assistant Secretary promulgated thereunder. Apart from the fact that the Assistant Secretary has delegated specifically that the Area Administrator shall determine the adequacy of a showing of interest, that it shall not be subject to collateral attack and that the showing of interest will not be furnished to any of the organizations listed in the petition, there was no timely challenge to the showing of interest made. The motion relating to whether there had been a proper showing of interest is not now relevant or material to whether there was improper conduct on the part of supervisory employees which affected the results of the election.

There is no allegation made nor has any certification issued that the NFFE has been recognized as the exclusive bargaining agent or union for any employees at the Activity's place of business. Apart from the fact that this forum is not the proper one to raise the question as to whether a conflict of law exists between the Executive Order and the Assistant Secretary's regulation, the motion is premature; the NFFE did not receive a majority of the votes cast and no certification was issued. It is not necessary for me to comment or speculate here as to what the Assistant Secretary's position would be regarding a conflict in the Order and Regulations, applicable to this case, were the results of the election otherwise.

The alleged instances of improper conduct outlined in the NFFE petition were not confined solely to the Conference Room where the election was held and the official Certification on Conduct of Elections which was signed by representatives of the Activity and NFFE certifying that "balloting was fairly conducted, that all eligible voters were given an opportunity to vote their ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote," was not incompatible with the allegations nor a bar to ascertain at the hearing any misconduct on the part of the Activity's management and supervisors which may have precluded a valid election. 5/

During the trial, the Activity moved to strike that part of the testimony of Lavon Harrod relating to the conduct of William Mason Gilliland and to exclude any testimony relating to the conduct of Eugene Kalwei because there was no timely objection made within five days after the tally of the ballots as to their conduct. One of the contentions made by the NFFE is that some remarks made by management supervisors concerning the union and the election in the work place area could be interpreted by rank and file employees as indicative of bias against the union on the part of management officials and/or supervisory employees, and that it was not limited in its proof to the specific acts alleged in its petition. Until

5/ See "Procedural Guide For Conduct of Elections Under Supervision of the Assistant Secretary Pursuant to Executive Order 11491 issued by the Assistant Secretary on February 9, 1970 at page 7."

their status was determined the testimony offered both as to Mr. Gilliland and Mr. Kalwei was relevant to the objection under consideration and whether the Activity carried out its responsibilities regarding the conduct of its management and supervisory personnel during the election period.

In view of the above, I recommend that the Assistant Secretary deny the Activity's motions including dismissal on procedural grounds.

III

THE BACKGROUND FACTS

The record reveals that on October 20, 1970 the NFFE filed its petition to be recognized and certified as the exclusive representative for employees at the Activity's place of business except for some specified personnel. The first group discussion by certain NFFE and nonunion members with management occurred on the same date. 6/ Thereafter, during the membership drive a system in the Activity's offices was arranged for the NFFE to contact employees primarily during lunch hours and coffee break periods; reserved space on each of the four bulletin boards was also made available as well as a certain number of mail drops for literature that had previously been seen to be distributed on the employees' desks. The latter was usually done by NFFE people before office hours. 7/ Various meetings were held by management of the Activity at one time or another with all employees of the Activity but at some of the meetings only those persons in GS-9 classification and above attended. On November 30, 1970, a memorandum from the Acting Directors of the Management Field Office and Data Processing Center and the Director, Commodity Office was issued to all employees of the Activity concerning "Notice of Election." The memorandum urged all eligible employees to vote in the election to be held on December 9, 1970 and an alphabetical voting schedule was suggested; those included and excluded in the unit for representation were defined and those who planned to vote an absentee ballot were advised as to the procedural arrangement. Persons having questions

6/ Assistant Secretary's Exhibit 1-E; testimony of Isaiah Reliford, Transcript pp. 154, 155.

7/ Tr., Allen Hessler, p. 487.

as to their eligibility were directed to contact the Employee Relations Branch on December 7 or 8. 8/

There was a revised list of eligible voters made on November 28, 1970 but the NFFE has questioned whether it was agreed to and properly initialed by its representative. During the election on December 9, 1970 several GS-9 Senior Computer Operators on the revised eligibility or voters list were challenged by the NFFE on the basis that they were supervisors.

The controversy or difference in opinion between the Activity and the NFFE over eligibility of certain persons to vote who were on the revised voters list is not considered to be of paramount importance since the issue here is not to ascertain the results of the election, but to assess and determine the effect the actions and conduct of those held to be supervisors may have had on those who voted and whether such actions may have induced or persuaded others from not voting who would have otherwise done so.

The Activity operated on a 24-hour schedule six and frequently seven days per week with each computer unit working one shift or 8 hours. 9/ A section or unit of the Data Processing

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8/ NFFE Exhibit No. 6. The memorandum among other things specified that those eligible for representation are: "All non-supervisory general schedule and non-supervisory wage grade employees including part time, temporary, intermittent, and seasonal employees who are employed by the USDA, ASCS with official duty station at 8930 Ward Parkway, Kansas City, Missouri.

"Those excluded from the unit are: managers, supervisors, employees doing personnel work except in a purely clerical capacity, guards and professionals.

"The term 'Supervisor,' means an employee having authority, in the interest of the Agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to evaluate their performance, or to adjust their grievances, or to effectively recommend such action, if in connection with the foregoing the exercise of authority is not merely of routine or clerical nature, but requires the use of independent judgment . . ."

9/ Testimony of Betty Cox, Tr. p. 429.

Operations Division to which the GS-9 Senior Computer Operators were assigned was comprised of approximately 15 people scheduled to each of three shifts. Each unit included a section head (Shift Supervisor) for each of the three shifts, three or four Grade 9 Computer Operators and about eight of either trainee or journeymen computer operators in Grades 4, 5 and 7, and two tape librarians Grade 4 or 5. Each shift was also split into two parts because half worked Monday through Friday and the other half Tuesday through Saturday. When a Shift Supervisor was absent one of the Grade 9 Computer Operators was designated to act in his or her place. The designation was made by memorandum each 4 weeks as the shifts changed with the names of the Shift Supervisor and two of the Grade 9 Computer Operators who were available for contact in case the Supervisor was absent. The Shift Supervisor authorized which one was to act for him if it was a planned absence. 10/

IV

THE COMPUTER OPERATORS

At the hearing there was considerable testimony presented regarding the GS-9 Computer Operators, also referred to as senior and lead operators. Their status as to supervisory classification was never definitely determined before or at the time of the election. 11/ Their number was not sufficient to have affected the result of the election regardless of classification. Whether one or more, or all of the GS-9 computer group was the subject of an election agreement or ineligible to vote in the election on December 9, 1970 is now immaterial. Their status at the time of election is important to ascertain because, if they were supervisors or representatives of management of the Activity, it is necessary to determine what, if any, influence and the extent thereof, they exerted on those eligible employees who voted and whether their words and actions may have induced others from not voting.

In examining the Order, section 1(a) provides:

> "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

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10/ Testimony of Emmett E. Stinson, Tr. p. 403, and Richard A. Bowles, Tr. pp. 414, 415.

11/ See testimony of George Moser, Chief Data Processing Operations Division (Tr. pp. 469, 474, 475 and 476).

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."

Section 2(f) of the Order defines Agency Management as follows:

"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."

Section 2(c) of the Order defines Supervisor as follows:

"'Supervisor' means an employee having authority, in the interest of an agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to evaluate their performance, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Section 19(a)(1) makes it an unfair labor practice for the following:

"Agency Management shall not . . .(1) interfere with, restrain, or coerce an employee in the exercise of rights assured by this Order. . ."

Basically the GS-9 Computer group is composed of machine operators and their job is to keep the large computers and peripheral equipment functioning and operating at all times. They deal primarily with machines rather than people but in view of the six and frequently the seven day schedules for each shift, some of the senior computer operators serve as assistant shift supervisor. There is no job classification or title in the Activity for Assistant Shift Supervisor. A shift supervisor has a GS-11 classification and this is recognized as a supervisory position. The job descriptions for the GS-9 computer operators that were submitted in evidence state that they are not typically supervisors over

others and normally their supervisory responsibilities include providing necessary training and instructions to a lower grade computer or peripheral equipment operator and answering technical questions when out of the ordinary situations arise. 12/

The definition of "supervisor" in the Executive Order is written in the disjunctive, accordingly to meet the definition it is not necessary that the individual involved possess all the authorities listed in section 2(c), but the possession of any one of the authorities listed places the employee invested with the authority in the supervisory class. Of course being merely invested with the authority is not sufficient. The true test is whether the employee in fact exercises the authority.

Applying the supervisory definition of the Order, it is concluded that the GS-9 Computer Operators as a group are not supervisors. In the performance of their normal duties, they do not meet the criteria set forth in the Order for a "supervisor." Actually, they have no authority over any employee in the course of their daily duties. The weight given to authorities or factors in the private and federal sectors not enumerated in the Order depends on the facts and circumstances of the individual case. 13/ The fact that some may substitute for the Shift Supervisor on a limited or sporadic basis is not a sufficient basis for a supervisory finding. Mere sporadic exercise of supervisory functions should not disqualify an employee otherwise having a community of interest with the other employees

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12/ As is customary with job descriptions, they list many functions and potential functions in broad language. The accuracy of the job description is not questioned here but in making findings of fact, primary reliance will be given to oral testimony and other material. The importance of the job description depends upon whether the duties described are actually performed in fact and substantiated by corroborative testimony or evidence.

13/ In a recent Decision and Order issued by the Assistant Secretary, Charleston Naval Shipyard, A/SLMR No. 1, he stated that he did not consider decisions issued in the private sector under the Labor Management Relations Act, as amended, controlling under the Executive Order, but would take into account experience gained in the private sector under that Act, as well as policies and practices in other jurisdictions and rules developed in the federal sector under the prior Executive Order 10988.

from inclusion in an appropriate unit. 14/ Moreover, ratio of employees should be considered in assessing supervisory status. Thus, if the GS-9 Computer Operators on each shift were considered supervisors, there would be about four supervisors for the remaining 11 persons on each shift. This would constitute an excessive number of supervisors where the shift supervisor is working substantially the same hours. 15/

V

PERSONNEL IN ISSUE--SUPERVISORY STATUS

Having concluded that the GS-9 Computer Operators as a group are not entitled to recognition or classification as supervisors, there remains for consideration whether one or more of them should be classified in a supervisory status on an individual basis.

During the time under consideration the Activity operated on a six and frequently a seven day schedule. Obviously the shift supervisor could not be present for such a lengthy workweek and overlapping schedules necessitated that one of the GS-9 Computer Operators on each shift serve in his place when absent. The GS-9 senior computer operator was frequently referred to as Assistant Shift Supervisor but there was no official title or grade classification for this position. Shift schedules and memoranda gave advance notice and designation as to which computer operator served in the event the shift supervisor was absent.

It is conceded the shift supervisor is a supervisory position and the evidence establishes that it is a supervisory position. Thus, where a GS-9 senior computer operator actually served for the shift supervisor on current, frequent and regular assignments for a prolonged period to enable the Activity to complete its six or seven day work program to fulfill its mission and the computer operator was recognized by employees as the person having authority to guide and direct their work activities, the requirements of the Order for recognition as supervisor are established. 16/

14/ Cf. in the private sector, Indiana Refrigeration Lines, Inc., 157 NLRB 539, 549-550; Gordon Mills, Inc., 145 NLRB 771.

15/ In the private sector, ratio of supervisors to employees is given great weight in determining supervisory status. See Sanborn Telephone Co., 140 NLRB 512, 515.

16/ The above is intended to comprehend items previously mentioned such as substitution for the shift supervisor must be on more than a limited or sporadic basis, and preservation of the ratio in assessing supervisory status between supervisors and other employees should be maintained.

Having evolved a standard for determination in this case as to which person in a group should be considered supervisor on an individual basis, it seems appropriate here to consider who the persons were and what improper conduct occurred on their part that could have affected the results of the election as alleged:

Maezel Baehr was unavailable to testify at the hearing. However, it was conceded that she was a GS-11 shift supervisor and that this was a supervisory position. The nature of the position and the evidence adduced at the hearing also substantiate that it is a supervisory one.

There were two witnesses who testified that on the day prior to the election on December 9, 1970, there was an afternoon meeting of two of the shifts called by Mr. Bowles to urge everyone to vote. Near the conclusion of the meeting, when asked if anyone had anything to say Mrs. Baehr remarked, "Believe me, I will escort everyone up to the polls, and take them by the hand, and make sure they do." Richard A. Bowles, Chief of Data Processing Division, verified that he heard her remark to this effect. 17/ At the end of the meeting, with approximately 30 people still standing around within hearing distance, she approached Mr. Brockman, stating that "if you two worked half as hard on your job as you do for the union, you'd both be Grade 12's by now." 18/ When one of the employees remarked that hard work had not paid off for some people, the reply was, "Well, it's silly, NFFE or whatever its name is, I still say that if you worked half as hard, and come early like you do for this NFFE, you'd both be higher grades than you are now."

One observer at the polls on election day testified that Mrs. Baehr escorted two or three persons to the polls. With one new employee, Mr. Ray Helflich, she escorted him into the voting area itself. When his vote was challenged she complained in a loud and boisterous tone in the presence of some 15 people who were present about the unfairness of the challenge. The incident was verified by other observers and persons who testified but some referred to her tone of voice as being natural or moderate. It is undisputed that the incident in the voting area occurred and that the challenge was a proper one as the employee did not have sufficient tenure to be eligible to vote.

One witness also testified as to another incident that occurred on election day as follows: 19/

17/ See Tr. p. 419.

18/ Tr. pp. 228, 229 referring to Mr. Brockman and Charles Herr.

19/ Tr. beginning p. 182.

"Q. ... Do you recall Mrs. Maezel Baehr acting in any special way on election day, and where did you hear her?

"A. Well, it was during working hours and I was sitting at my desk.

"Q. Can you particularize it a little bit more? Was it earlier in the day, noontime, early in the morning?

"A. I think it was afternoon.

"Q. You think it was afternoon?

"A. Yes, sometime in the afternoon, I think, and apparently she had been up with one of her Grade 9, lead operators, Jack Hawkins, and I didn't know what happened, because I was still at my desk working, but when they came back, and as she started to go into her office, she was extremely excited and waving her arms around and saying, 'I am going to start a war of my own.' And she looked back towards Mr. Moser's office and Tom Warren--people that were at the back of the room there, and then she went into her office after she said this. 20/

"Q. Now, was that--was she yelling that loudly, that people could hear her?

"A. Uh huh. Very loudly.

"Q. Very loudly?

"A. Yes.

"Q. And how big a group was there?

"A. Well, the whole section--the people that I work with.

"Q. And your section adjoins the shift section, does it not, the computer room.

"A. Yes.

20/ The incident was stated to have occurred about 3:00 or 3:30 P.M. Tr. p. 185.

"Q. And together how many employees are there?

"A. (No response)

"Q. The computer room and the--your branch, or your section--

"A. Well,

"Q. Mr. Dubert's group?

"A. They would not have heard her in the computer room because that is enclosed. The door is closed.

"Q. Well, your group--how many are there in your group?

"A. Oh --

"Q. More than ten?

"A. About ten, about ten.

"Q. What about the control section, could they have heard it, or did they hear it?

"A. You mean Mr. Kirkpatrick's section?

"Q. Yes.

"A. I am sure they could have.

"Q. Yes, and about how many people are in there?

"A. There is, oh, anywhere from 15 to 20, somewhere."

The Procedural Guide For Conduct of Elections Under Supervision of the Assistant Secretary Pursuant to Executive Order 11491, at page 12, provides: "Neither supervisors, managerial employees, nor labor organization officials should be in or near the polling place while the election is being conducted. Only official observers and voters may be in voting places during an election."

From the foregoing I find that Maezel Baehr was a supervisor ineligible to vote; that on election day she escorted voters to the voting area and actually entered the voting room insisting that one of them presented be allowed to vote; that the day before the election and on the day of the election her remarks and conduct in the presence of numerous employees were at such times and places as to discourage employees from exercising their rights, freely and without fear of penalty or reprisal, to form, join or assist a labor

organization as their bargaining representative. For well known and long time supervisors to be in the voting area during an election in other than an official capacity, such as observer, is considered to be a violation of the Order in the absence of compelling reasons or circumstances justifying their presence. The evidence in this case did not show any justifiable reasons or circumstances for Mrs. Baehr's presence in the voting area.

Thomas P. Warren. Mr. Warren testified on direct examination that he was a GS-9 Operations Scheduler in the Data Processing Center; that his job description provided: "The incumbent, in the absence of the head of the scheduling section, will be the acting head of the section and will exercise the necessary coordination of the section personnel to achieve and maintain the work flow and requirements of the section. The incumbent will exercise the necessary supervision on the detail work to accomplish the work in the most expeditious manner." He stated that there were thirteen employees in the section and that during vacation and annual leave periods he acted as supervisor of the section and that his work was substantially supportive of management. Other testimony substantiated that Mr. Warren had served as operations scheduler frequently and had served as the supervisor when his immediate head was absent. The Activity conceded at the hearing that prior to the election Mr. Warren had been listed as a supervisor and the Activity would abide by the agreement. 21/

Mr. Warren and William R. Reed each stated that they went to vote together on the day of the election. Mr. Reed and an observer who worked at the election from 8:00 o'clock until noon testified that Mr. Warren voted in the morning. 22/ When Mr. Warren's vote was challenged on the basis that he was a supervisor, he remarked that "if he was a supervisor who was paying him for this." It was stated that he was loud but not angry or obnoxious. Mr. Warren admitted that on the day of the election that he made the statements "Only the misfits have joined the union" and "The ones that are not capable of getting along on their own." Mr. Warren was uncertain as to the time he made the statements but Virginia Braga stated that it was close to the lunch hour. She had overheard the remarks in a conversation between Mr. Warren and Ora Moore. She also said that about

21/ See statement of Activity Counsel, p. 84.

22/ Testimony of M. Kay Wright, Tr. pp. 339, 340. I credit Miss Wright's testimony as establishing the time Mr. Warren voted since she was an observer and served only until noon. Her testimony is also substantiated by others.

two weeks prior to the election Mr. Warren stated that ". . . He didn't want anything to do with unions, that he had enough to do with unions in the past when he had done construction work in previous years." She enumerated several of the employees who were present when the remarks were made.

I find that Thomas P. Warren was a supervisor ineligible to vote in the election on December 9, 1970; that before and on the day of the election his anti-union remarks and conduct as agent of management were in the presence of other employees eligible to vote and at such times and places as to discourage employees from exercising their rights, freely and without fear of penalty or reprisal, to form, join or assist a labor organization.

Bill B. Boyel. Mr. Boyel testified that he was a GS-9 Computer Operator and often acted as the supervisor of the 13 or 14 persons on his shift when the regular assigned shift supervisor was absent. He was acting as shift supervisor on the day of the election. There is also credible substantiating testimony from various Activity and NFFE witnesses that Mr. Boyel had acted as shift supervisor on frequent occasions over an extended period. I find that at the time of the election Mr. Boyel met the requirements for recognition as a supervisor within the meaning of the Executive Order and was ineligible to vote.

Under section 10(b)(1) of the Executive Order "supervisors" should be excluded from the unit. In this case, counsel for the Activity argued that since the parties had agreed on a list of employees eligible to vote, the NFFE should not have been permitted to challenge any voters on the list because of their supervisory status. A consent election agreement is final and binding unless it contravenes the policy of the Executive Order or policy established by the Assistant Secretary. Even if I assumed that the consent election agreement included the comprehensive list of employees eligible to vote as claimed, it would be in violation of the Executive Order which specifically states that a unit shall not be established if it includes any supervisor. 23/

23/ In the case of Department of the Army, Army Materiel Command Automated Logistics Management Systems Agency No. 62-1800(RO), the Hearing Examiner after finding that certain employees were supervisors stated: ". . .Under section 10(b)(1) of the Executive Order 'supervisors' should be excluded from the unit. But, the 'Agreement for Consent or Directed Election' executed by the parties defines supervisors as those occupying positions classified with an S (for supervisor) behind the job number on the official job description, and these employees do not meet that definition. As stated above,

Clarence Hoerman testified on redirect examination that at 7:00 A.M. on the morning of the election he inquired of Mr. Boyel as to when was the best time for him to go vote and if he had any arrangement set up. Mr. Boyel answered no, and didn't offer any specific information saying, "I'll come around and tell you" or something to that effect; he also said I shouldn't go as long as my machine was running. I stopped my machine and went ahead and voted. His attitude was negative about the whole thing and he made a point of bringing out a card from his pocket and writing the time down on top of it which gave me the impression that he was keeping track of people going to vote. He was discourteous. Later in the morning after I had returned from voting, I heard Bill Boyel returning from upstairs and he made the statement to Mr. Bowles, the Assistant Division Chief for Data Processing Center, in the work area of "D.C. and A" where other employees were congregating coming to work that "there was no use in even going up there." From what I learned later on, the remark was made after his vote had been challenged and he was expressing the opinion that there wasn't any use even going up to vote and he expressed the same opinion to other employees. Mr. Bowles

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23/ (continued) in connection with the Hearing Examiner's conclusions on the status of challenged voters in the Programs Management Office, a consent election agreement is final and binding unless it contravenes the policy of the Executive Order or policy established by the Assistant Secretary. In this matter, it is the opinion of the Hearing Examiner that to include supervisors in the unit would contravene the policy of the Executive Order, which specifically states that a unit shall not be established if it includes any supervisor. The reasons for the policy excluding supervisors are well stated in the Study Committee Report and Recommendations on Labor-Management Relations in the Federal Service dated August, 1969, at paragraph C. titled, 'Status of Supervisors:

> 'We view supervisors as part of Management, responsible for participating in and contributing to the formulation of agency policies and procedures and contributing to the negotiation of agreements with employees. Supervisors should be responsible for representing management in the administration of agency policy and labor-management agreements, including negotiated grievance systems, and for expression of management viewpoints in daily communication with employees. In short, they should be and are part of agency management and should be integrated fully in that management.'"

See footnote 13, supra.

testified that on coming to work on election day, he asked Mr. Boyel if he had been to vote and when he stated that he had, and made the remark that there was no use in even going up there, he, Mr. Bowles, took it to be that Mr. Boyel was commenting on his own experience.

There was testimony at the hearing that Mr. Boyel was instrumental in giving publicity to an article "Union Dues Seen Rising" which was in the Federal Employees News Digest dated December 7, 1970. 24/ It was stated that the article was kept on the top of all papers in Mr. Boyel's cubicle for a week prior to the election. The Federal Employees News Digest, published in Washington, D. C., is a widely circulated news sheet issued weekly except the last week in December and the first week in January of each year. There are regular subscription rates. Some comment was made that although the issue date was December 7, 1970 the paper was available prior to that date. The fact that the item concerning Rise in Union Dues appeared in the news sheet about the time of the election is not shown to have been other than coincidental. The Federal Employees News Digest is a widely circulated federal employees news sheet available to any person desiring to buy or subscribe to it. There was nothing in the article pertaining to the election; the subject matter related only to general comment as to likelihood of increase in dues of federal unions and was susceptible of fair evaluation by anyone who cared to read it.

The NFFE made a point that Mr. Boyel had worked considerably more overtime than other employees and that Mr. Hoerman's overtime had been reduced after October 1970 when the union began its campaign to organize the Activity employees. I credit the testimony of Betty Cox, who kept the official records on overtime, as best reflecting the time and periods worked by the stated employees. The record shows that overtime was assigned on a voluntary basis depending on the machine required to do the job, the people who are qualified to operate it and those desiring to work. I find that the assignment of overtime and Federal Digest news article were not in any way related to the election, or affected the results thereof, or that either constituted an interference, restraint and coercion of employees in exercise of rights assured by the Order.

The NFFE in its brief has referred to a prevailing belief that certain employees at the GS-9 level were spying on union members and sympathizers. The testimony of Clarence H. Hoerman was cited that GS-9's had been called off their jobs on two separate occasions and told to keep watch on employees in the union; that on November 24, 1970 he asked Bob Sparks whether there had been a meeting in which the GS-9's were instructed to spy on the union and he replied in the affirmative; that Forrest P. Wardell stated essentially the same thing the following day. (Tr. 136, 208, 209) There was supporting testimony from Donald L. Brockman, Lavon L. Harrod,

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24/ See NFFE Exhibit #5.

William Mason Gilliland, June Harrington and Charles O. Herr that they had heard or were aware of union members being under surveillance by GS-9 operators. (Tr. 199, 229, 286, 288, 334) Management or supervisory surveillance of employees beyond the scope of accomplishing a job mission, if established, might tend to intimidate and restrict those surveiled. 25/ In this case, the substantive evidence, apart from hearsay testimony that was presented to establish surveillance, is lacking.

Considering the time, place, circumstances and entire evidence of record, I find that Mr. Boyel's remarks and actions on the day of the election were a part of and contributed to a pattern of conduct by some supervisory personnel designed to restrain employees in the exercise of their rights assured by the Order.

Eugene L. Kalwei. Mr. Kalwei testified on direct examination that he was a GS-9 senior computer operator and had never served as shift supervisor when others were absent but on two occasions since he returned from the Army in September 1969, he had lead the shift. He also stated that Bill Boyel usually filled in for Betty Cox, the shift supervisor, when she was absent and if Mr. Boyel was absent, Robert Sparks would serve. George D. Moser stated that he had checked the records from September 28, 1969 through December 9, 1970 and they revealed that Mr. Kalwei had served twice during that period as acting supervisor, and that Mr. Hoerman's recollection that Mr. Kalwei had served 10 or 15 times was apparently incorrect. 26/ Mr. Kalwei is alleged to have made sarcastic and obscene comments concerning the union to employees.

I find that Mr. Kalwei's substitution for the shift supervisor was not on a more than limited or sporadic basis, that as a computer operator he did not fulfill the requirements of the Order to be entitled to recognition or classification as a supervisor, either on a group or individual basis; also, that he was an eligible voter and the remarks allegedly made by him were a permissible expression of opinion as a rank and file employee and may not be attributed to management.

Leo F. Pete, Jr. Mr. Pete testified on direct examination that he was a GS-9 lead operator and worked on the shift that Maezel Baehr supervised; also, that he was only promoted to his present position on October 18, 1970 and did not have occasion to serve as shift supervisor prior to the election on December 9, 1970. This phase of Mr. Pete's testimony is undisputed. He is alleged to have contributed to the disturbance and decomposure of the voting atmosphere on election day.

I find that at the time of the election, Leo Pete, as a GS-9 computer or lead operator did not qualify under the Order for recognition or classification as a supervisor on a group or individual basis; that he was eligible to vote in the election and that any remarks, disturbance or decomposure of voting atmosphere that he is alleged to have contributed to may not be attributed to management.

Victor L. Mahan, Art Lohr, Mr. Whalen and Mr. Schwaab. 27/ In Assistant Secretary's Exhibit No. 1-D, the Regional Administrator found that Art Lohr's name appeared on the list of eligible voters in the election on December 9, 1970 and was not challenged; that Victor Mahan, Mr. Whalen and Mr. Schwaab were challenged by the NFFE in the election but the challenges were withdrawn and they were permitted to vote. There was no testimony introduced at the hearing as to their job status, remarks or conduct. I therefore conclude that the NFFE has not carried its burden of proof to establish that the four above-named persons were other than eligible voters or that any alleged remarks or actions on their part were other than permissible expressions of opinion as rank and file employees and may not be attributed to management. In this connection, remarks made by nonsupervisory employees are considered in the same manner as remarks by pro-union adherents urging support of the union.

VI

REQUIREMENTS OF THE EXECUTIVE ORDER 28/

Section 1(a) of the Executive Order assures or requires the following:

> (1) It provides that "Each employee of the Executive Branch of the Federal Government has the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right . . ."

25/ Cf. National Tape Corporation and Textile Workers Union, 187 NLRB No. 41, 76 LRRM 1008 (1971); Medley Distilling Company, Inc., 187 NLRB No. 12, 76 LRRM 1103 (1970).

26/ See Tr. 468.

27/ The full names of Mr. Whalen and Mr. Schwaab are not disclosed in the record.

28/ See section 1(a) of Executive Order, p. 14.

(2) It requires the head of the Agency or Activity to do the following:

> "(a) 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
>
> "(b) that no interference, restraint, coercion or discrimination is practiced within his agency to encourage or discourage membership in a labor organization."

VII

PATTERN AND TOTALITY OF CONDUCT

The Order requires that the head of the Agency or Activity shall take action to assure that there is no interference, restraint, coercion, or discrimination practiced within his agency to encourage or discourage membership in a labor organization. The Procedural Guide for Conduct Of Elections under Supervision of the Assistant Secretary Pursuant to Executive Order 11491 precludes management and supervisory personnel from being in or near the polling place while the election is being conducted. 29/

It has been conceded that Maezel Baehr and Thomas P. Warren were supervisors. The remarks and conduct attributed to them are largely unrefuted by the Activity and include

(1) A statement by Mrs. Baehr verified by Richard A. Bowles, Chief of Data Processing Division, at a meeting with employees in GS-9 grade and above on the day before the election that she would escort everyone to the polls on election day and make sure they voted.

(2) Mrs. Baehr escorted two or three employees to the polls on election day. She entered into the voting area with one to converse as to his right to vote; about fifteen persons were reported to be present; the employee she accompanied into the voting area was found to be ineligible to vote on a tenurial basis.

(3) Mrs. Baehr made remarks before approximately 30 employees after a group meeting on the day before the election while talking to Donald L. Brockman and Charles O. Herr; she stated that if they had worked half as hard on the job as they did for the union they would both be in higher grades.

29/ See p. 16 supra.

(4) Between 3:00 and 3:30 P.M. on the day of the election Mrs. Baehr stated in a loud and excited manner that she was going to start a war of her own. The remark was made in the presence of about 10 employees in her own section and 15 or 20 in an adjoining section.

(5) Thomas P. Warren admitted that on the day of the election he made the statements that "Only the misfits have joined the union" and "The ones that are not capable of getting by on their own." It was found that the statements were made before several employees about noon on election day and there was evidence that about two weeks previously he had stated: He "didn't want anything to do with unions," that he "had enough to do with unions in the past" when he had done construction work in previous years.

Bill B. Boyel was also found to be a supervisor and was overheard by employees to remark, after he had cast his challenged ballot, that "there was no use in even going up there" indicating to vote. There was testimony that he made no arrangement for members in his section to vote. From the overall testimony of Mr. Boyel and others his remarks and conduct were made at a time and under circumstances such as to dissuade rank and file employees from voting in the election.

Viewing the totality of evidence in its proper work area setting and circumstances, the barrage of incidents and remarks made by certain heretofore named supervisory personnel throughout the day before election and on election day, the number of employees to whom the remarks were directed or who were easily within hearing distance, and the disturbances in the voting area when challenges were exercised, including the actual entering of the polls or voting area by a supervisor, it is evident that the actions were certainly susceptible by rank and file employees as indicative of anti-union animus on the part of management. Since the incidents occurred on the day before and throughout a substantial part of the polling period at or near the polls and throughout the building on election day, and involved an indeterminate number of voters, I find that there was a pattern of improper conduct and overall coercive atmosphere of fear engendered which was calculated and designed to influence or persuade employees from not exercising their freedom

of choice in voting in the election and that such affected the results of the election. 30/

CONCLUSIONS

From a review of the foregoing, it is hereby concluded:

(1) There were numerous incidents and disturbances caused by Activity supervisory employees which occurred in the work and voting area on the day before and on the day of the election which constituted a pattern of improper conduct which persuaded or influenced employees from not exercising their freedom of choice in voting in the election. Such also constituted an unfair labor practice under section 19 of the Order which states that Agency management shall not "interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order."

(2) The repeated incidents, remarks and disturbances, including a supervisor entering the voting area, constituted violation of section 1(a) of the Executive Order requiring the Agency head to take action to assure "that no interference, restraint, coercion or discrimination is practiced within his agency to encourage or discourage membership in a labor organization."

30/Ordinarily, isolated or remote incidents are not considered sufficient to overturn the results of election. In this case it was considered significant that there was no attempt by management to inform Mrs. Baehr that she could not accompany voters to the polls as she had indicated she would do at the open meeting of GS-9 grade employees and above, on the day before the election; that the rules prohibited supervisory personnel from entering the voting area or otherwise taking an active part in an election. While this alone was not considered enough to overturn the election, the total pattern of conduct on the day before and on the day of the election, coupled with the voting incidents, were influencing reasons.

Cases in the public and private sector, as previously indicated in footnote 13, supra, are not governing here. However, experience gained in these sectors is not lightly to be disregarded. Totality of conduct and deliberateness of anti-union campaign on part of employers have been elements for consideration in sustaining objections to election and ordering elections. See Wigwam v. Mills, Inc., 1964 CCH, NLRB, 13.638; 14 NLRB (No. 146), enfd., CA-7; (1965) 52 LC 16.665; Ely v. Walker, 1965 CCH, NLRB 9183, 151 NLRB (No. 72); Lane Drug Stores, Inc., (1950) 88 NLRB 584.

(3) The remarks and incidents occurred within the presence or area of numerous but indeterminate number of employees, throughout a substantial part of the polling period at or near the polls and elsewhere in the work area.

(4) Improper conduct on the part of certain heretofore named supervisory personnel affected the result of the election.

RECOMMENDATION

For the reasons stated, it is recommended that objection No. 5, insofar as it relates to conduct of certain management supervisory personnel as having affected the results of the election, be sustained and the election held on December 9, 1970 be set aside and a new election be directed under the terms of Executive Order 11491, and in accordance with the applicable Rules and Regulations of the Assistant Secretary. 31/

Rhea M. Burrow
Hearing Examiner

Dated at Washington, D. C.

this 30th day of September, 1971.

31/ Attached hereto as Appendix A are a few items in the transcript which appear to require correction.

APPENDIX "A"

Corrections in the Transcript

Page	Line	Correction
157	21	Change Mr. Geller to Mr. Penstone.
159	3	Change December 8th to December 9th.
172	2	Change faze to phase.
173	22	Change business to building.
Vol. II	21 (contents-witnesses)	Change Boyd to Boyel.
282	15	Change question to objective.
357	12	Change can to will.
422	22	Change ruling to really.
486	5	Change Allem to Allen.
510	21	Strike like that in this evidence; add in lieu thereof; that is not in evidence.
511	1	Strike as being immaterial; add which is not in evidence.
520	8	Change marks to ranks.
520	9	Change dimenimous to de minimus.
524	11	Change dimidimous to de minimus.

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

DEPARTMENT OF THE ARMY DIRECTORATE,
UNITED STATES DEPENDENT SCHOOLS,
EUROPEAN AREA (USDESEA)
APO, NEW YORK
A/SLMR No. 138

This case involves a complaint filed by Local 1551, Overseas Federation of Teachers (affiliated with American Federation of Teachers, AFL-CIO), against Department of the Army Directorate, United States Dependent Schools, European (USDESEA) APO, New York, alleging violations of Sections 19(a)(1), (5) and (6) of the Executive Order.

In the complaint filed on June 1, 1970, the Complainant alleged that the Respondent had failed to negotiate in good faith with the exclusive representative of its employees following the expiration of the parties' collective bargaining agreement in February 1970.

The Assistant Secretary adopted the findings, conclusions and recommendations of the Hearing Examiner that the Complainant had not met the burden of proof with respect to the 19(a)(1), (5) or (6) allegations of the complaint. In reaching his decision, the Assistant Secretary noted that it was unnecessary to decide whether certain post-complaint conduct was violative of the Order as the complaint had not been amended to include such conduct and, therefore, it was not properly before the Hearing Examiner. Also, the Assistant Secretary concluded that the Respondent's conduct in evacuating the building and its subsequent scheduling of make up classes where in response to an emergency situation created by a bomb scare on the date of the evacuation. In such circumstances, the Assistant Secretary concluded that the Respondent was not required to discuss such changes with the Complainant prior to their implementation.

Accordingly, the Assistant Secretary dismissed the complaint in its entirety.

A/SLMR No. 138

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY DIRECTORATE,
UNITED STATES DEPENDENT SCHOOLS,
EUROPEAN AREA (USDESEA)
APO, NEW YORK 1/

Respondent

and

Case No. 46-1807 (CA)

LOCAL 1551, OVERSEAS FEDERATION OF
TEACHERS (AFFILIATED WITH AMERICAN
FEDERATION OF TEACHERS, AFL-CIO)

Complainant

DECISION AND ORDER

On October 28, 1971, Hearing Examiner Henry L. Segal issued his Report and Recommendations in the above-entitled proceeding, finding that the Complainant had not met the burden of proof with respect to the 19(a)(5) and (6) allegations contained in the complaint and that the evidence was insufficient to establish independent violations of 19(a)(1) of the Order. Accordingly, he recommended that the complaint be dismissed in its entirety. No exceptions to the Hearing Examiner's Report and Recommendations were filed by the parties.

The Assistant Secretary has reviewed the rulings of the Hearing Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Hearing Examiner's Report and Recommendations and the entire record in the subject case, including a brief filed by the Respondent, 2/ I hereby adopt the findings, conclusions 3/ and recommendations of the Hearing Examiner. 4/

ORDER

Pursuant to Section 6(a)(4) of Executive Order 11491 and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the complaint be, and it hereby is, dismissed.

Dated, Washington, D. C.
February 29, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

1/ As noted by the Hearing Examiner, the specific facility involved in the instant proceeding is the Kaiserslautern American High School.

2/ The Complainant did not file a brief in the instant case.

3/ In his Report and Recommendations, the Hearing Examiner considered conduct which occurred after the instant complaint had been filed on June 1, 1970, and concluded that such conduct was not violative of the Order. The Complainant did not amend its complaint to include such post-complaint conduct. In these circumstances, I find that such conduct was not properly before the Hearing Examiner. Therefore, it was not considered in reaching the disposition herein.

4/ In agreement with the Hearing Examiner, I find that the bomb scare incident of April 29, 1970 involved an emergency situation. In this connection, I view the Respondent's evacuation of the building and the subsequent scheduling of make up classes that same day to be responsive to that immediate emergency. Accordingly, in the particular circumstances of this case, I find the Respondent was not required to discuss such changes with the Complainant prior to their implementation.

500-836 O - 73 - 9

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

DEPARTMENT OF THE ARMY, DIRECTORATE,
UNITED STATES DEPENDENT SCHOOLS
EUROPEAN AREA (USDESEA)
APO NEW YORK 09164 1/

Activity

CASE NO. 46-1807(CA)

and

LOCAL 1551, OVERSEAS FEDERATION OF
TEACHERS (AFFILIATED WITH AMERICAN
FEDERATION OF TEACHERS, AFL-CIO)

Complainant

Lt. Col. Robert S. Poydasheff, Chief,
Civilian Personnel Law Office, Office
of the Judge Advocate General,
Department of the Army, Washington,
D. C., for the Respondent
James Blaydon, Past President and
David Spencer, Chairman, Negotiating
Committee, Local 1551, Overseas
Federation of Teachers, Kaiserslautern
American High School, APO New York 09227,
for the Complainant

Before: Henry L. Segal, Hearing Examiner

1/ The name of the Activity appears as stated in the Complaint and Notice of Hearing. However, it is noted that the specific facility involved in this proceeding is the Kaiserslautern American High School.

REPORT AND RECOMMENDATIONS

Statement of the Case

This proceeding, heard at Kaiserslautern, Germany, on July 1 and 2, 1971, arises under Executive Order 11491 (herein called the Order) pursuant to a Notice of Hearing issued by the Regional Administrator of the Labor-Management Services Administration, United States Department of Labor, Philadelphia Region, on May 25, 1971, in accordance with Section 203.8 of the Regulations of the Assistant Secretary for Labor-Management Relations (herein called the Assistant Secretary). It was initiated by a Complaint filed by the Complainant on June 1, 1970, alleging that Respondent has engaged in and is engaging in violations of Section 19, subsections (a)(1), (5) and (6) of the Order.

At the hearing the Complainant was represented by elected officials and the Respondent by counsel, who were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue orally and file briefs. Upon the entire record in this matter, from observation of the witnesses and after due consideration of the brief filed by the Respondent on September 30, 1971, I make the following:

Findings and Conclusions

I. The Issues

The Complaint filed on June 1, 1970, alleges specifically that the Respondent in the person of Frithjof R. Wannebo, principal of Kaiserslautern American High School (herein called KAHS), stated in meetings that the agreement between Local 1551 and the Director, United States Dependent Schools European Area (herein called USDESEA),"expired" on February 1, 1970, and any conditions in that agreement were obsolete. Further it is generally alleged that Wannebo has refused to negotiate personnel policies, practices and working conditions affecting unit personnel.

In addition, subsequent to the filing of the Complaint, as will be discussed further below, the Respondent discontinued negotiations in early 1971 because of a petition for exclusive recognition filed with the Assistant Secretary by a rival labor organization for a broad unit encompassing the unit involved herein. Complainant's parent organization, American Federation of Teachers, also filed a petition with the Assistant Secretary.

Accordingly, the issues to be resolved are as follows:

(1) Whether the Respondent refused to consult, confer, or negotiate with a labor organization within the meaning of Section 19(a)(6) of the Order by its actions to the time it discontinued negotiations in 1971, and whether the discontinuance of negotiations under the circumstances was violative of Section 19(a)(6).

(2) Whether any of the Respondent's activities constituted a refusal to accord appropriate recognition to a labor organization qualified for such recognition within the meaning of Section 19(a)(5) of the Order.

(3) Assuming that the Respondent did engage in activity violative of Sections 19(a)(5) and/or 19(a)(6) of the Order, whether such activity also constituted interference with, restraint, or coercion of an employee in the exercise of the rights assured by the Order within the meaning of Section 19(a)(1) of the Order.

II. Respondent's Motion to Dismiss on the ground of "Mootness"

Before discussing the merits, it is appropriate here to dispose of a motion to dismiss made at the hearing and renewed in its brief by the Respondent on the ground that the case is moot. Respondent reasons that the Complaint refers to actions of the then principal of KAHS, Wannebo. Wannebo, at the conclusion of the school year in summer, 1971 was transferred. Thus, with a change of management, the Respondent avers that there can be no violation now as there is no present "management animus."

This contention falls for the following reasons. Wannebo was not acting on an individual basis. He was a management official charged by the Respondent with the duty of handling labor relations at KAHS with an exclusive representative of a unit of employees. The Respondent is responsible for the acts of Wannebo engaged in on its behalf. Unfair labor practices of an agency, when they occur, are normally the acts of individuals acting on behalf of the agency. To hold that an agency is cleansed of its unfair labor practices affecting employees of the agency by the elimination of the officials that engaged in the violative acts would defeat the whole purpose and policy of the

Order. Accordingly, I will recommend that the Assistant Secretary overrule respondent's motion to dismiss on the ground of mootness. 2/

III. The Unfair Labor Practices

A. Activity Involved and Recognition

United States Dependent Schools European Area, herein called USDESEA, as its name implies, is a directorate of the United States Army which operates schools for military dependents in the European area.

On October 26, 1965, Complainant was recognized under the previous Executive Order 10988 as exclusive representative of a unit of, "non-supervisory school professional personnel who are regular United States citizen employees of the Department of the Army and assigned to the Kaiserslautern High School." The letter of recognition which was signed by Joseph A. Mason, Director, USDESEA, specified that the principal of Kaiserslautern High School would represent the Director in establishing and conducting the relationships under the provisions of the recognition.

In the two agreements between the parties negotiated to date the unit has been defined as, "The school professional personnel of the Kaiserslautern American High School, excluding principals, assistant principals, supervisors, clerical and local National Employees."

B. The Negotiated Agreements

Subsequent to the grant of recognition the Complainant and Respondent negotiated two succeeding agreements which expired by their terms respectively on January 1, 1968 and February 1, 1970.

2/ In its brief Respondent cites cases in the private sector where the National Labor Relations Board dismissed on the ground of mootness. The cases cited by the Respondent are distinguishable on the facts. For example, in Kentile, Inc., 145 NLRB 135, where after a strike was over the Employer continued to honor the current contract, the Board held that the policy of the Act would not be effectuated by ordering a remedy. In Puerto Rican American Sugar Refinery, Inc., 136 NLRB 428, the issue involved was whether the Employer refused to bargain by refusing to grant a union shop and checkoff. Subsequent to the close of the hearing the Employer did accede to the complaining party's demands. Accordingly, there was no need for a remedy.

Three clauses in the last agreement (the first agreement had substantially similar clauses) are quoted here because they are basic to the problems encountered during negotiations.

" ARTICLE 4 - Negotiable Items.

a. General: Matters appropriate for consultation or negotiation shall include policies and practices affecting working conditions, 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, and hours of work.

b. Specific items considered appropriate for negotiation are listed below:

(1) Activity Program
(2) Lunch Program
(3) Assemblies
(4) Student Discipline
(5) Length of Duty Day
(6) Student Activity Funds
(7) Teacher Evaluation
(8) Number of Teacher Preparations
(9) Equality of Class Load
(10) Signing In and Out
(11) Covering of Classes during Absence of other Teachers
(12) Faculty Meetings
(13) "Any Purpose" Leave
(14) Assignment of Extra Duties
(15) Implementation of Curriculum Planning and Educational Policy
(16) Class Assignment of Department Heads

ARTICLE 5 - Administration of the Written Agreement.

After negotiation and agreement on any of the items or subjects such as those listed in Article #4, the details of the agreement will be reduced to writing if desired by either side, and will be added to this agreement as alphabetically designated appendices. The appendices will be treated as supplemental agreements to the basic agreement and as such will require approval from Department of Army in accordance with CPR 700.

ARTICLE 6 - Meetings.

Two formal meetings will be held each month during the school year. Additional informal meetings to exchange information and resolve routine operating procedures may be called by management. Fewer formal meetings may be held as mutually agreed. The agenda for formal meetings will be furnished both parties at least one week in advance of the scheduled meeting.

Each bargaining team may have five (5) members plus one recorder, three (3) of the five (5) may be active participants, present at the formal bargaining session. Chairmanship will be rotated between the parties to the agreement. When possible meetings will be held in the conference room, building 2010. If the use of this conference room is not possible, a new location will be arranged by management."

The two agreements were negotiated and signed by the then principal and deputy principal of the KAHS.

A study of these agreements indicates that they were not negotiated agreements in the normal sense of a collective bargaining agreement. In substance, while they contained certain general clauses such as definitions, recognition, rights and obligations, there were no real substantive clauses. They were actually agreements to negotiate in the future on a continual regular basis twice a month with respect to designated general subjects and,if appropriate, execute supplemental agreements.

The "modus operandi" during the terms of the agreements was for the complainant and/or the labor organization to submit an agenda for each of the twice-monthly meetings. The parties would discuss the matter and,if agreement was reached,they would negotiate a supplement agreement. The twice-monthly meetings were numbered consecutively from the inception of the first agreement.

C. Principal Wannebo's Conduct During the Term of the Second Agreement

Frithjof R. Wannebo reported as new principal at KAHS in August 1968 and served in that position until June 21, 1971. When Wannebo reported the negotiated agreement which was to expire on

February 1, 1970, was still in effect and under Articles 4, 5, and 6 of that agreement, the Complainant continued to set agendas for the regular twice-monthly meetings. Wannebo took the position at first that these regular sessions were consulting and conferring sessions, not negotiating sessions. For example, one of the items listed in Article 4 of the agreement as being negotiable was the item "teacher evaluation." The Complainant sought to negotiate on teacher evaluation at these regular sessions held during the term of the agreement and Wannebo took the position that he would only "consult and confer," the ultimate resolution of any problems on teacher evaluation being management's option. There were some 40 grievances filed based on his position with respect to the status of the regular meetings. As a result of these grievances, on 28 May 1969, by letter to an official of the Complainant, Wannebo conceded that at these formal meetings, consultations, exchanges of information, discussions, bargaining and negotiations would take place, and amendments to the basic agreement could be negotiated. There is no contention that Wannebo did not comply with the terms of the agreement from that time to the expiration of the agreement on February 1, 1970.

D. Negotiations for New Agreement

Negotiations actually commenced on December 19, 1969, where at a regular twice-monthly session held under the existing agreement, the parties discussed negotiations for a new agreement. It was agreed that under the Order the negotiation sessions could not be held during school time. Wannebo suggested a pre-negotiation session to set up ground rules, which was agreed to by the Complainant.

By letter dated January 12, 1970, to James Blaydon, then president of Complainant, Wannebo submitted management proposals to be discussed at pre-negotiation sessions. In that letter, Wannebo referred to the Union's contention made at the December 19, 1969 meeting that the current agreement continues in full force and effect until a new agreement is reached, and Wannebo advised that the agreement terminated on February 1, 1970.

At the next regular twice-monthly meeting held on January 15, 1970, pursuant to the agreement which was to expire on February 1, 1970, management again called attention to the fact that the agreement would expire. The Complainant stated that the regular bi-monthly meetings should be continued to negotiate current problems until a new agreement was negotiated. At this meeting the Complainant accepted management's proposals on ground rules for negotiations with certain modifications.

On January 22, 1970, Wannebo submitted new contract proposals to the Complainant.

At the last twice-monthly session held under the existing agreement in January 29, 1970, Wannebo advised he would no longer meet on a regular twice-monthly basis since the contract was about to expire, that he would meet to negotiate a new agreement, but on immediate matters would only consult and confer at times when the matters arose.

On February 4, 1970, the Complainant submitted proposed changes in the existing agreement. In substance it was a proposal to revise the agreement which expired on February 1, 1970, to conform to the Executive Order, but to continue the provisions for continuous negotiations on a regular basis, except instead of twice a month they should be four times a month.

By letter dated February 11, 1970, Wannebo advised Blaydon that he would meet at reasonable times to discuss problems affecting working conditions, but that it was important that they meet to negotiate a new agreement.

According to past president Blaydon, the Complainant wanted two teams to negotiate, one on a regular basis to negotiate immediate problems, the other to negotiate a new agreement.

From this point it becomes necessary to summarize the negotiations, because there were 20 lengthy negotiation sessions with respect to a new agreement held between February 24, 1970 and March 18, 1971, as well as many informal meetings and numerous pieces of correspondence between the parties. At these negotiations, agreement was reached on many matters including a format for an agreement. I will restrict my further discussion to what the parties testified were the problem areas.

1. Provision for Continual Negotiation Meetings

The Complainant persevered in its demands for clauses listing general subjects for negotiations and for regularly scheduled negotiating meetings during the school term to negotiate with respect to the general subjects. In other words, the Complainant insisted at negotiations and in written proposals that any new agreement contain clauses similar to Articles 4, 5, and 6 of the expired agreement set forth above. Thus, by memorandum to the principal, KAHS, on March 2, 1970, it proposed again negotiative/consultative meetings twice a month, and any agreements reached, if desired by either side, would be reduced to writing and be treated as a supplemental agreement.

By memorandum to the principal dated April 10, 1970, the Complainant again proposed Article 4 of the old agreement listing general negotiable items. But, it again changed its position as to when regular formal negotiation meetings should be held to from two a month to four a month during the school year.

Wannebo's position throughout negotiations also remained basically the same. He wanted to negotiate an agreement without clauses calling for continual negotiations. He did not want to list in an agreement general subjects which would be negotiable on a continual basis. He asked that the Complainant submit concrete substantive proposals which he would negotiate as part of the agreement, if they were negotiable items under the Order. (The Complainant never did present specific substantive proposals for an agreement except to list general subjects for negotiation, presumably as subjects for continuous negotiations. 3/) He offered to grant a provision for meetings during the school term, not on a regular basis, but to be held as necessary when specific problems arose, to consult and confer on these problems. Further, he proposed that if either party was not satisfied with informal resolutions and wanted to negotiate on the problem, notice would be given, and if it were a proper subject for negotiation under the Order, negotiation would take place. Wannebo's position was substantiated by a memorandum dated September 21, 1970, from the Chief of Labor Relations for the Department of the Army, in which he directed local principals, with respect to contract negotiations, to strike any references to "so-called" continuous negotiations.

3/ For example, on December 17, 1970, the Complainant presented a list of 45 subjects with no concrete proposals as to the subjects. Some of the subjects listed were teacher evaluation, school day, improvement of facilities, curriculum, selection of high school department chairman and duties, personnel assignments, teaching assignments, school calendar, field trip policy, etc.

2. Problem of Correct Name of Management Party

As noted above, the initial recognition letter of October 26, 1965 was from the Director of USDESEA. In that letter the Director advised that the principal, KAHS would represent the Director. The two agreements which were negotiated and signed by the principal contained an initial clause stating that the Director, USDESEA has designated the principal of KAHS to represent him. In the current negotiations under discussion, Wannebo contended that he was head of the Activity and he would sign any agreement as head of the Activity. The Complainant argued that he was only the representative of the Director, USDESEA, that unless the agreement was with USDESEA, the Director of USDESEA could issue policies affecting its constitutents of which KAHS is a part, and the Complainant would then be unable to meet with the Director with respect to broad policies which might affect the teachers at KAHS.

There was considerable discussion at the negotiation sessions on this subject and the parties agreed to place the issue with the Secretary of Defense. On May 25, 1970, they sent position papers to the Secretary of Defense seeking resolution of the issue, and there was a discontinuance of negotiations for some months while awaiting an answer. Ultimately, an answer was received from the Department of Defense affirming Wannebo's position.

3. Problem of Duration of Agreement

With respect to duration of agreement the Complainant proposed an automatic renewal clause if either party did not at a specified time notify the other that it wished to negotiate a new agreement. Wannebo did not object to this. However, the Complainant also proposed that if an agreement was opened for renegotiation the existing agreement would be extended for a fixed period during the new negotiations. (At one point the Complainant suggested three months and at another six months.) Wannebo took the position that he did not want to place a fixed extension in the agreement, that the matter of extending an existing agreement was a subject for negotiation at the time of negotiations for a new agreement.

4. Problem of Resolution of Matters of Immediate Concern

During the negotiations for a new agreement, the Complainant continued to submit proposed agendas for negotiations of matters of

immediate concern as if the old expired contract were still in force. Wannebo suggested that these proposals, if negotiable, could be negotiated as part of the agreement. The Complainant took the position that these matters were of immediate concern and could not wait for a total negotiated agreement which would have to be approved by the head of the agency. Wannebo offered to consult and confer on these immediate problems. The Complainant refused on the ground that Wannebo was required to negotiate. Of course, the problem was one of terminology and Wannebo's position was the same as it was at negotiations on the issue of a continuous negotiation clause, that he would consult and confer and try to arrive at an agreement and if the matter were negotiable and no agreement was reached he would negotiate.

Apparently, the desires of both parties were the same regardless of terminology used. Wannebo's use of the words "consult" and "confer" were with the idea of consulting and conferring to arrive at an agreement. The Complainant's use of the word "negotiate" was based on the various subjects outlined in the expired agreement, and Wannebo's position was that certain subjects might not be negotiable under the Order. (He apparently had in mind Sections 11(b) and Sections 12(a) and (b) of the Order.)

An example of the problem is the one relating to examination schedules. In the past, under the expired contract, examination schedules would be taken up as an item at a formal twice-monthly session and an agreement would be worked out which would be submitted to a higher authority for approval. With respect to the June 1970 examination schedules, the Complainant asked for a negotiation meeting to work out examination schedules. Wannebo offered to "consult" and "confer" for an examination schedule and, in fact, on May 21, 1970, wrote a letter to the Complainant's president, Blaydon, asking to meet in a formal session on May 26, 1970, to "consult, confer, bargain, and inform" on five specified items of immediate concern: Locker clean-up and lock turn-in schedule, year end class schedule, closing of school activities, senior test schedule, and grades 9-11 test schedule. The Complainant refused to meet, and Wannebo instituted his own ideas on these matters, including examination schedules. (The Complainant apparently considered this to be a unilateral change in working conditions.) With respect to the 1971 examination schedule, when Complainant was lead by a new president, a meeting was arranged by Wannebo on the same basis as he proposed in 1970, and an examination schedule was mutually arrived at and instituted.

The Complainant raised another matter, apparently as an example of failure to negotiate immediate problems and a unilateral change in working conditions. During 1970, there was a "bomb scare" at the school and classes were dismissed. The supervising principal for the area (Wannebo was absent) directed an extra half day of classes to make up for the time lost. The Complainant contends that this constituted an unilateral change in the work day and should have been negotiated. Of course, this was a one-time occurrence.

E. The Suspension of Negotiations

On June 10, 1970, the Overseas Education Association, NEA filed a petition in Case No. 46-1813(RO) with the Assistant Secretary seeking a unit of all nonsupervisory professional employees of the Department of Defense Overseas Dependent Schools assigned to the Atlantic, European and Pacific Areas. This requested unit would include the unit at KAHS involved in the instant proceeding. On October 1970, petitions were filed by the Overseas Federation of Teachers, AFT, AFL-CIO, Case No. 22-2061(RO) (The Overseas Federation of Teachers is the Complainant's parent organization) and by various locals of the Overseas Federation of Teachers. These petitions sought various units. The various petitions were consolidated for hearing before the Assistant Secretary and a hearing was held before a Hearing Officer of the Department of Labor between March 1 and 11, 1971. A decision of the Assistant Secretary is pending.

On 31 March 1971 a teletype was sent from the Department of the Army to its interested constituents with respect to the impact of the pending petitions and hearings. In view of the impact on negotiations the teletype is quoted verbatim.

"Subject: Impact of unit representation hearings on negotiations by USDESEA with OEA and by school principals with OFT locals.

1. Hearings were held 1 and 9 - 11 March in Washington, D.C. by the Department of Labor (DOL) on OEA petition for exclusive recognition in OEA-proposed unit of teachers and other professional non-supervisory personnel in DOD schools world-wide. Until the ruling by the Assistant Secretary for Labor-Management Relations (ASL LMR) on this case, and pursuant to Part 202 of DOL rules, it is inappropriate for management at any level within USDESEA to enter into, continue or complete negotiation of a labor agreement with a labor organization. For management to do so with a labor organization while the unit representation case is before the ASL LMR, could make management vulnerable to allegations by an intervening labor organization of assisting the other labor organization and thus violating Sec 19A(3) of EO 11491.

2. No estimate is made by this headquarters as to when ruling by ASL LMR can be expected. Considering the amount of testimony taken in 4 days of hearings and the fact that DASD (Civilian Personnel Policy) requested extension to 7 May 1971 for the hearing brief, it is understood the ruling is not expected before September 1971.

3. The comment in paragraph 1 does not affect the extension by mutual desire of the USDESEA-OEA Agreement (understood informally to have been approved in concept by your headquarters) which expires 1 April 1971. Such extension would be a stabilizing factor in employee management relations, since it would provide for continued representation of employees in the bargaining unit under terms of the negotiated agreement (e.g., use of the negotiated grievance procedure). It likewise would be appropriate if any school principal and the OFT local concerned mutually agreed to continue under the terms of an expired agreement.

4. For your information, the Federal Mediation and Conciliation Service (FMCS) has indicated that in a situation where the question of representation is directly involved in a unit representation case being processed under DOL rules, FMCS assistance is not available prior to resolution of the case by ASL LMR.

5. Since no negotiations on agreements are appropriate until resolution of the unit representation case, there will be no negotiation reaching impasse, and no occasion for parties in any bargaining unit in USDESEA schools to resort to the Federal Services Impasses Panel (FSIP). For your information, the following is quoted in part from FSIP Report No. 7 of 3 Feb 1971 in a case involving the Norfolk Naval Shipyard, Portsmouth, Va: "The Panel determined that it could not take jurisdiction of the request at this time inasmuch as acceptance of jurisdiction by the Panel, where a question of representation was pending, would be inconsistent with the terms and conditions of Executive Order 11491 and the rules and regulations issued pursuant thereto.""

As a result of the teletype, Wannebo discontinued negotiations. In view of the provision in the teletype that it would be appropriate if any school principal and the OFT local concerned mutually agreed to continue under the terms of an expired agreement, the Complainant asked Wannebo to extend the expired contract. Wannebo replied that he would agree to an extension except for paragraphs 4, 5, and 6 calling for continuous negotiations on specified subjects. He reiterated that he would consult and confer on problems as they arose and attempt to arrive at solutions. The Complainant did not want an extension unless paragraphs 4, 5, and 6 were also extended.

CONCLUSIONS

I will discuss first whether the suspension of negotiations by the Respondent pursuant to directions of superior authority in April 1971 constitutes a refusal to negotiate within the meaning of Section 19(a)(6) of the Order. Management bottomed the suspension on the pendency of the petitions for exclusive representation before the Assistant Secretary in that to negotiate an agreement with an incumbent labor organization for a unit which is in question under a petition filed by a rival labor organization would make management vulnerable to allegations by the petitioning rival union that management was illegally assisting the incumbent labor organization in violation of Section 19(a)(3) of the Order. I agree that in the proper circumstances, it would be inappropriate for management to negotiate where a question concerning representation of the unit involved exists, as evidenced by the filing of a petition by a rival labor organization with the Assistant Secretary. There is considerable support in the private sector for such a position, and

the Assistant Secretary has held that although not bound by experience in the private sector he will take into account such experience. 4/ The National Labor Relations Board has held that, "Upon presentation of a rival or conflicting claim which raises a real question concerning representation an employer may not go so far as to bargain collectively with the incumbent (or any other) union unless and until the question concerning representation has been settled by the Board." Shea Chemical Corporation, 121 NLRB 1027, 42 LRRM 1486. See also Connie Jean, Inc., 162 NLRB 154, 64 LRRM 1243; Midwest Piping Company, Inc., 63 NLRB 1060; 17 LRRM 40. This Board doctrine which is known as the "Midwest Piping Doctrine" requires that a "real" question concerning representation be raised, for the Board stated in Shea Chemical Corporation, supra, "The Midwest Piping Doctrine does not apply in situations when, because of contract bar or certification year or other established reason, the rival claim does not raise a representation question." 5/

In the instant case, it is significant that the Respondent waited until there was an actual hearing on the petitions before the Assistant Secretary before suspending negotiations. It is clear that

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4/ Charleston Naval Shipyard, A/SLMR No. 1.

5/ It would appear that the Federal Service Impasses Panel takes a similar position as the National Labor Relations Board. In a case involving the Norfolk Naval Shipyard, Case No. 70 FSIP 13, the Panel decided to hold in abeyance a request to consider a negotiation impasse until the Assistant Secretary of Labor for Labor-Management Relations, United States Department of Labor, had acted upon a petition for an election in the same bargaining unit which had been filed by another union. The Panel determined that it could not take jurisdiction of the request at this time inasmuch as acceptance of jurisdiction by the Panel, where a question of representation was pending, would be inconsistent with the terms and conditions of Executive Order 11491 and the rules and regulations issued pursuant thereto. See Panel Report Number 7, February 3, 1971.

as to the unit involved at KAHS there was no problem of certification year or contract bar, and the Respondent was reasonably justified in its assumption that a "real" question concerning representation was raised by the petitions where the Assistant Secretary determined that a hearing on the petitions was necessary.

In view of the above, it might be argued that it is unnecessary to make a finding with respect to the negotiations which occurred preceding the suspension of negotiations, since a "real" question concerning representation was raised and the Respondent could await the resolution of the question by the Assistant Secretary before continuing negotiations. 6/ While I do conclude that if a real question concerning representation is raised management normally should suspend negotiations, in this case if Respondent failed to negotiate within the meaning of Section 19(a)(6) prior to the suspension of negotiations, the Complainant should be afforded a remedy. This follows because if the Respondent did engage in unfair labor practices, such unfair labor practices could conceivably have prevented the execution of an agreement before the question concerning representation was raised. It therefore becomes necessary to make a finding as to whether the Respondent negotiated in conformance with the Order up to the time of suspension.

It appears that the basic position of the Complainant, as evidenced by its complaint, is that Wannebo failed to continue with the provisions of the agreement calling for continual negotiations at specified times during the school year on specified general subjects for negotiation. Wannebo, justifiably stated that the agreement expired on February 1, 1970, and that it was proper for management to negotiate a new agreement.

6/ In fact, the question concerning representation was raised on June 10, 1970, only five months after the previous agreement expired, when the Overseas Education Association filed its petition. However, as noted above, the Department of the Army waited until the hearing on the petitions was held before it directed Respondent to suspend negotiations.

Negotiation within the meaning of Section 19(a)(6) does not require that management agree to a labor organization's demands; it, too, may make demands. Here, there were some twenty lengthy negotiation sessions conducted before suspension of negotiations. Complainant admitted that there was agreement reached on many issues, and that progress was being made. It stresses that the only demands of the Complainant which reached impasse were the demands for provisions for continuous negotiation during the school year and for a listing of general subjects for negotiation which could be raised as required at these regularly scheduled sessions. As noted above, Respondent was not required to agree to these provisions, it was required to negotiate. Wannebo did not want to bind himself to regularly scheduled negotiations throughout the school year. (In fact, during negotiations higher agency authority directed that such provision not be included in an agreement.) He also did not wish to bind himself to general subjects for future negotiations. Justifiably he reasoned that specific items which might arise under a general subject might be outside his purview to negotiate because of agency policy or because certain items might be those left to the discretion of management under Sections 11(b) and 12(b) of the Order. He desired to negotiate an agreement with substantive terms, not an agreement to negotiate in the future.

At any rate, the record reveals considerable negotiations by the Respondent with respect to the demand for a continuous negotiation provision, and admittedly the parties reached an impasse on this provision. Reaching an impasse does not make a violation of the Order, and the Order at Sections 16 and 17 provides for machinery to resolve such impasses.

As to the issue of the Respondent's proposal for a clause providing for automatic extension for a set period of an existing agreement during negotiations for a new agreement, again, negotiation within the meaning of Section 19(a)(6) does not require that Respondent accede to the Complainant's demands. Respondent did negotiate on this issue, and as noted, Complainant admitted that progress was being made in the negotiations.

Turning now to the problem of resolution of immediate problems arising on a day to day basis which could not await the finalization of a negotiated agreement, it is my opinion, as noted above, that the only

problem was one of language rather than substance. The Complainant wanted Wannebo to bind himself to negotiate over immediate problems such as "examination schedules." (This was in line with the Respondent's obvious insistence of holding on to the terms of the expired agreement.) Wannebo offered to consult and confer on immediate problems as they arose. The Respondent refused to do so. (Wannebo instituted his own examination schedules in 1970 only after Respondent refused to meet because of a "hang up" in terminology.) Actually, as Wannebo explained to the Respondent, he desired to arrive at agreements on these problems. However, he could not bind himself to negotiate on the immediate problems, since it might involve a problem which was outside his authority to resolve or might be an item reserved for management under the Order. He went further to assure the Respondent that if it were a negotiable item he would negotiate. That Wannebo was desirous of working out such problems to the satisfaction of the Complainant is evidenced by the handling of the examination schedules in 1971. With respect to the 1971 examination schedules he offered to consult and confer with the Complainant, and the new President of the Complainant did so. 1971 examination schedules were devised apparently to the satisfaction of both parties.

With respect to the "make up" classes to compensate for class time lost due to a bomb scare, this was an emergency situation which is within the purview of management. Certainly, in the event of a bomb scare, it would be unrealistic to require that management consult with a labor organization before classes are excused. On the other hand, management's decision to make up for lost time caused by an emergency situation is within its discretion under the purview of Section 12(b) of the Order. At any rate, as a one time situation, I do not consider that the action of Respondent in making up class time under the circumstances to be a unilateral change in working conditions which is violative of Section 19(a)(6) of the Order.

The Complainant also alleges that the Respondent refused to accord it recognition within the meaning of Section 19(a)(5) of the Order. Certainly, there is no evidence that the Respondent ever refused to accord recognition to Complainant for the unit at KAHS. Apparently, the Complainant is urging that Wannebo's position that he would negotiate an agreement as head of the Activity is violative of Section 19(a)(5). Actually, the Activity involved is KAHS, and the top managerial employee at KAHS was Wannebo. Higher authority confirmed that he was head of the Activity to negotiate the agreement, after, by mutual agreement, the parties submitted the issue to the Secretary of

Defense. The fact that language was used in the instrument of recognition and in the previous agreements to indicate that the Principal was a representative of USDESEA is immaterial. Such language does not deter from the Principal's status as head of the Activity, and in a realistic sense the head of an activity is automatically a representative of higher authority in the agency involved. Complainant's concern that it would be unable to have a voice with USDESEA in matters which might affect its unit at KAHS is unfounded. The Order itself provides at Section 11(c) machinery for the Respondent to contest actions of higher authority which might affect negotiability.

In view of the above, I conclude that the Complainant has not met its burden required by Section 203.14 of the Regulations of the Assistant Secretary of proving by a preponderance of evidence that the Respondent has engaged in unfair labor practices within the meaning of Section 19, subsections (a)(5) and (6) of the Order. Further, inasmuch as the Respondent has not violated these sections of the Order, and inasmuch as there was no evidence presented of independent violations of Section 19, subsection (a)(1) of the Order, I conclude that Respondent has also not engaged in unfair labor practices within the meaning of Section 19, subsection (a)(1) of the Order.

RECOMMENDATIONS

Upon the basis of the aforegoing findings and conclusions it is recommended that the Assistant Secretary deny Respondent's motion to dismiss the Complaint on the ground of mootness; however, with respect to the merits of Complainant's allegations, it is recommended that the Complaint be dismissed in its entirety.

Henry L. Segal

Dated at Washington, D. C.,
OCTOBER 28, 1971

HENRY L. SEGAL
Hearing Examiner

March 6, 1972

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

DEPARTMENT OF THE NAVY AND
THE U. S. NAVAL WEAPONS STATION
A/SLMR No. 139

This case arose when International Association of Fire Fighters, AFL-CIO (IAFF) and National Association of Government Employees, Local R4-1 (NAGE) filed identical complaints against Department of the Navy and the U. S. Naval Weapons Station (Navy) alleging violations of Section 19(a)(1), (2) and (4) of the Executive Order. All allegations contained in the complaints were directed at the undisputed fact that the Navy had implemented and effectuated a policy under which employees who participated as witnesses on behalf of a labor organization at a formal unit determination hearing being held pursuant to the Regulations of the Assistant Secretary were not permitted to participate on official time while employees who appeared as witnesses on behalf of the Respondent were granted official time status. The Navy contended that neither the Executive Order nor the Regulations of the Assistant Secretary required that it allow official time to persons appearing on behalf of a labor organization at such a proceeding being held pursuant to the Regulations of the Assistant Secretary. Further, the Navy argued against the adoption of such a rule contending that it would be subject to abuse; that it was inconsistent with private sector practice; that it was unnecessary; and that it was contrary to the philosophical intent of the Order.

The Navy had made a motion for the severance and dismissal of the complaint filed by the IAFF on the basis of a contention that by waiving its appearance at the hearing and the filing of a brief, it had failed to meet the burden of proving the allegations in its complaint. The Assistant Secretary granted the Navy's motion for dismissal of the IAFF's complaint, agreeing that the absence of a complainant, even in the instant circumstances where there was another complainant who came forward with evidence, seriously detracts from the hearing process provided for under the Regulations. The Assistant Secretary concluded that the IAFF by not appearing and participating in the hearing had not met its required burden of proof and he dismissed the complaint filed by that labor organization.

With respect to the merits of the allegations contained in the NAGE's complaint, the Assistant Secretary noted that the employee rights set forth in Section 1(a) of the Executive Order include the right, freely and without fear of penalty or reprisal, to assist a labor organization. He concluded that the right to assist a labor organization places on agency management an affirmative obligation to facilitate the exercise of such right by making available on official time essential union witnesses at formal unit determination hearings held pursuant to the Regulations of the Assistant Secretary in order to enable the Assistant Secretary to render unit determination decisions based on full and complete factual records. Accordingly, the Assistant Secretary concluded that a denial of such an employee right inherently interferes with the exercise of rights assured by the Order in violation of Section 19(a)(1), irrespective of the absence of proof of anti-union motivation. Further, he concluded that agencies are not obligated to make available on official time any employees who appear solely as union representatives.

The Assistant Secretary concluded that the Navy's conduct did not violate Sections 19(a)(2) and 19(a)(4) of the Order. As to the 19(a)(2) complaint, he noted particularly that he viewed the essential right at issue in the instant case to be the right to participate as a witness in a formal unit determination hearing before him rather than membership in and activities on behalf of a labor organization.

With respect to the 19(a)(4) complaint, the Assistant Secretary concluded that the Navy's conduct in restoring the deducted annual leave to the 3 employees involved and its stated willingness to make witnesses available if they were requested by either a Hearing Officer or Hearing Examiner rendered moot the question whether there had been discipline or other discrimination against the affected employees. However, he noted that if, in the future, an agency refuses to permit necessary employee union witnesses to testify at formal unit determination hearings on official time, which would include payment of any necessary transportation and per diem expenses, such conduct may be considered violative of Section 19(a)(4) of the Order.

In reaching his determination in the instant case, the Assistant Secretary considered the potential for abuse and the effect that such abuse would have on the efficiency of Governmental operations and, accordingly, established a mechanism to prevent such possible abuse. Where agency management has been given notice as to those witnesses requested to participate in such a proceeding held pursuant to the Regulations of the Assistant Secretary and the reasons therefor and deems the request to be unreasonable in that it exceeds what is "necessary" to that proceeding, agency management should give the requesting party written notification of its decision to reject the request and the reasons therefor. The requesting party may then appeal such denial to either the appropriate Regional Administrator prior to the opening of the hearing, or the Hearing Officer after the opening of the hearing. If the Regional Administrator or Hearing Officer deems that the disputed witnesses are necessary to the proceeding, he may then issue a Request for Appearance of Witnesses. The Assistant Secretary noted that an agency's refusal to make such necessary witnesses available on official time at formal unit determination hearings may be deemed violative of the provisions of Section 19(a) of the Executive Order. In this regard, he stated

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that his decision in the matter was limited to the facts presented which involved union witnesses appearing at formal unit determination hearings held under the Executive Order.

The Assistant Secretary ordered that the Navy cease and desist from promulgating or maintaining a policy of refusing to make available on official time necessary union witnesses for participation at a formal unit determination hearing held pursuant to his Regulations.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY AND
THE U.S. NAVAL WEAPONS STATION

Respondent

and Case No. 22-2330 (RO)

INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, AFL-CIO

Complainant

DEPARTMENT OF THE NAVY AND
THE U.S. NAVAL WEAPONS STATION

Respondent

and Case No. 22-2334 (RO)

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R4-1

Complainant

DECISION AND ORDER

On August 16, 1971, Hearing Examiner Frank H. Itkin issued his Report and Recommendations in the above-entitled proceedings, finding that the Department of the Navy and the U. S. Naval Weapons Station located at Yorktown, Virginia, herein called Respondent 1/, had engaged in certain unfair labor practices and recommending that it take certain

1/ While the complaints were filed against the Department of the Navy and the U. S. Naval Weapons Station, because of the nature of the facts of the case the Hearing Examiner treated them as a single respondent. No party excepted to this conclusion and, further, I view it as appropriate under the circumstances. It should be noted that this conclusion affects neither the findings nor remedy provided herein.

affirmative action as set forth in the attached Hearing Examiner's Report and Recommendations. Thereafter, the Respondent and Complainant, National Association of Government Employees, Local R4-1, herein called NAGE, filed exceptions and supporting briefs with respect to the Hearing Examiner's Report and Recommendations. 2/

The Assistant Secretary has reviewed the rulings of the Hearing Examiner made at the hearing and finds that no prejudicial error was committed. Except as otherwise provided herein, the rulings of the Hearing Examiner are hereby affirmed. Upon consideration of the Hearing Examiner's Report and Recommendations and the entire record in the subject cases, including the exceptions, statements of position and briefs, I hereby adopt the findings, conclusions, and recommendations of the Hearing Examiner to the extent consistent herewith. 3/

The complaints in the instant cases, filed by the IAFF and the NAGE, are identical in content. They allege that the Respondent violated Sections 19(a)(1), (2) and (4) of the Executive Order 4/ by the implementation and effectuation of a policy under which employee witnesses who participated on behalf of a labor organization at a representation hearing being held pursuant to the Regulations of the Assistant Secretary were not permitted to participate on official time. At the same time, under the Respondent's policy, employee witnesses who appeared on behalf of the Respondent were granted official time status.

2/ Complainant, International Association of Fire Fighters, AFL-CIO, herein called IAFF, filed no exceptions to the Hearing Examiner's Report and Recommendations.

3/ During the course of the proceeding in this matter, a new Executive Order, No. 11616, was issued on August 26, 1971, effective November 24, 1971, amending portions of Executive Order 11491. Notwithstanding that the instant proceeding is governed by Executive Order 11491, it should be noted that Executive Order 11491, as amended, contains no relevant revisions of any Executive Order sections applicable herein. Therefore, the following discussion and conclusions may be regarded in terms of future applicability under Executive Order 11491, as amended.

4/ According to a stipulation entered into by the Respondent and the NAGE at the hearing, the NAGE's pre-complaint unfair labor practice charge alleged only violations of Section 19(a)(1) and (4) of the Order. However, there is no indication that any party timely alleged noncompliance with the pre-complaint requirements of the Assistant Secretary's Regulations. In these circumstances, I find no procedural defect which would preclude the processing of the 19(a)(2) allegation in the complaint. See Veterans Administration Hospital, Charleston, South Carolina, A/SLMR No. 87, pp. 2-3.

The Respondent does not deny the existence of the policy which precipitated the filing of the instant complaints, but contends that neither the Executive Order nor the Regulations of the Assistant Secretary require that it allow official time to persons appearing on behalf of a labor organization at a proceeding being held pursuant to the Regulations of the Assistant Secretary. In this regard, the Respondent argues against any ruling that would require the granting of official time to union representatives and witnesses contending that it would be subject to abuse; that it is inconsistent with private sector practice; that it is unnecessary; and that it is contrary to the philosophical intent of the Executive Order. The Respondent also contends that the complaint filed by the IAFF should be dismissed as that Complainant has failed to sustain its burden of proof as required by the Regulations of the Assistant Secretary.

The essential facts of the cases, which are not in dispute, are set forth, in detail, in the Hearing Examiner's Report and Recommendations, and I shall repeat them only to the extent necessary.

As noted above, the Respondent seeks the dismissal of the complaint filed by the IAFF. The record reflects that subsequent to the consolidation of the above-entitled cases and the issuance of the Notice of Hearing by the Regional Administrator, counsel for the IAFF notified the Regional Administrator and all parties that the IAFF was waiving its appearance at the hearing and the filing of a brief, but would "remain a party to this case..." 5/ At the hearing, the Respondent moved to sever the subject cases and to dismiss the IAFF's complaint on the ground that by waiving appearance at the hearing and the filing of a brief, it could not fulfill the requirement of Section 203.14 of the Regulations that a complainant has the burden of proving the allegations in the complaint. No representative of the IAFF attended the hearing. Subsequent to the close of the hearing, the IAFF notified the Hearing Examiner by letter that it felt that the Respondent's motion should be denied in that the facts of the cases were not in dispute and that the consolidation of complaints in the subject cases established "co-complainants" so that the proof offered by the NAGE met the burden of proof requirements of the Regulations. The Hearing Examiner denied the Respondent's motion based essentially on the reasons asserted by the IAFF in opposition to the motion. The Respondent excepted to this ruling.

Based on the foregoing circumstances, I do not adopt the Hearing Examiner's ruling as to the above motion to dismiss the IAFF's complaint. The Respondent correctly urges that the Assistant Secretary's Regulations require that at a hearing on an unfair labor practice complaint the burden of

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5/ The IAFF's letter to the Regional Administrator is dated June 18, 1971. The hearing in this matter was held on June 22, 1971.

proving the allegations lies with the complainant. This obligation cannot be met by a complainant who does not even appear at the hearing. 6/ The absence of a complainant at a hearing, even in the instant circumstances, can seriously detract from the hearing process provided for under the Regulations. 7/ Accordingly, I reject the recommendation of the Hearing Examiner in this respect and shall grant the Respondent's motion to sever the instant cases and dismiss the IAFF's complaint in Case No. 22-2330 (RO) on the grounds that it has not met its prescribed burden of proof. 8/

With respect to the merits of the unfair labor practice allegations in Case No. 22-2334 (RO), the facts are relatively simple and, as noted above, are not in dispute. On September 9 and 10 and November 4, 1970, a formal unit determination hearing was held under Executive Order 11491. 9/ The Respondent was the Activity in the representation matter, the IAFF was the petitioner and the NAGE was the incumbent-intervenor. On the first two days of that hearing, the Respondent presented its case, calling as witnesses both supervisory and nonsupervisory employees. Neither labor organization presented any witnesses at that time, but employees of the Respondent attended as "representatives" of the labor organizations. All employees who participated at those two days of hearings, whether as witnesses or "representatives," were deemed by the Respondent to be on official duty and were not required to take annual leave or leave without pay. In late October 1970, the Respondent notified the two labor organizations involved that any employees appearing for them when the hearing reconvened

6/ While it may be true that in the particular circumstances of this case, it can be assumed that the content of the hearing would have been substantially the same had a representative of the IAFF attended, I am of the opinion that the principles and policies of the Executive Order are effectuated by the establishment of a uniform policy as to the obligations of a "moving party."

7/ In this regard, it should be noted that the IAFF is not actually a party to a stipulation herein which provides much of the pertinent evidence in this proceeding.

8/ Cf. Veterans Administration, Veterans Administration Hospital, Downey, Illinois, A/SLMR No. 81.

9/ The hearing resulted subsequently in a Decision and Direction of Election in U. S. Naval Weapons Station, Yorktown, Virginia, A/SLMR No. 30.

would be carried "off-the-clock," which would mean that they would either have to take annual leave or leave without pay. This new policy was applied subsequently to the one employee who attended the hearing and appeared as a witness on behalf of the IAFF and to two employees who similarly attended and appeared on behalf of the NAGE. 10/

Determinations of the specific allegations raised by the complaint herein must, of course, be premised on the scope of the grant of rights contained in the Executive Order. The Respondent argues that nothing in the Order requires that it do what the Complainant requested of it, i.e., make employees available on official time when they were designated as its witnesses who would participate in the unit determination hearing. In this regard, the Respondent contended that Sections 19(a)(1), (2) and (4) of the Order are concerned with "employee rights" while at issue here are "union benefits." I do not view the mandates of the Executive Order so narrowly. Section 1(a) of the Order grants employees under the Order's jurisdiction "the right, freely and without fear of penalty or reprisal, to form, join and assist a labor organization."

In my view, the right to assist a labor organization does not accord to Federal employees a protected right merely to present their views to the Assistant Secretary but places on agency management an affirmative obligation to facilitate the exercise of that right to present views on behalf of a labor organization where the right involved is directly related to the implementation of the processes of the Executive Order, including the development of full and complete factual records upon which I can render unit determination decisions. Nor can this obligation be satisfied by allowing employees to take annual leave or leave without pay to attend formal unit determination hearings conducted pursuant to the Executive Order as such a policy would hamper my ability to render meaningful unit determination decisions, work to the detriment of the employees involved and, necessarily, interfere with the exercise of their rights expressed in the Order. Further, I view the philosophical doctrine on which the Executive Order is premised to be distinguishable from that of the private sector, and, therefore, a policy different from that of the private sector is warranted. In the private sector, the National Labor Relations Act has as its purpose the providing of orderly and peaceful adjudicatory procedures for the resolution of labor disputes, including strikes and other forms of industrial strife and unrest which impair the interest of the public in the

10/ One of the two employees appearing on behalf of the NAGE was the NAGE Local President who was an employee of the Respondent, but was not in the unit at issue in the hearing.

free flow of commerce. 11/ In the Federal sector, Executive Order 11491 repeatedly recognizes that the well-being of employees and efficient administration of the Government are benefitted by providing employees an opportunity to participate in the formulation and implementation of personnel policies and practices affecting the conditions of their employment. An application of the Executive Order philosophy of encouraging such relationships would, in my view, require necessarily that agency management make available on official time essential witnesses at non-adversary fact-finding proceedings held pursuant to the Regulations of the Assistant Secretary to assure a full and fair hearing based upon which I can fulfill the responsibility assigned me by the President under Section 6(a)(1) of Executive Order 11491.

An additional defense raised by the Respondent is that the policy requested by the Complainant would be in violation of Section 20 of the Executive Order which is entitled, "Use of official time." However, that provision, by its express terms, is limited to "internal business of a labor organization" and to "negotiating an agreement with agency management." I do not view the participation as a witness in formal unit determination hearings held pursuant to Section 6(a)(1) of the Executive Order to fall within the purview of these limitations, and, accordingly, do not consider Section 20 relevant in such circumstances. 12/

11/ The Respondent correctly points out that in unit determination proceedings held pursuant to the provisions of the National Labor Relations Act, employers are not required to pay the wages of their employees who appear on behalf of a labor organization. However, persons who advocate the adoption of private practices in this area should take note that in the private sector, employees have the right to strike; unions may negotiate "union security" provisions in their contracts so that all unit employees must pay union dues and fees; and the National Labor Relations Board pays fees for persons whom it has subpoenaed to appear as its witnesses in formal unit determination proceedings.

12/ It should be noted in connection with the above interpretation of Section 20 that during the October 1970 hearings held by the Federal Labor Relations Council (FLRC) it was requested that language be added to Section 20 to make clear that employees shall not be on official time while assisting or appearing on behalf of a labor organization at any proceeding arising out of Sections 4, 5, or 6 of the Order. In its Report and Recommendations on the amendments of Executive Order 11491, which became effective November 24, 1971, the FLRC listed as a matter considered, but not included in its recommendations, a request to "prescribe uniform policy regarding official time for employees representing labor organizations in third-party proceedings."

With respect to the specific findings of unfair labor practices in the subject case, I am in agreement with the Hearing Examiner with respect to his finding of a 19(a)(1) violation. Thus, having concluded above that the exercise of Section 1(a) employee rights involves a concomitant obligation on behalf of agency management to make available on official time employee witnesses who are deemed necessary to unit determination hearings held pursuant to the Regulations of the Assistant Secretary, it follows that the denial of such an employee right inherently would tend to interfere with, restrain or coerce employees in the exercise of rights assured by the Order. In this regard, as found by the Hearing Examiner, a finding of a Section 19(a)(1) violation on the basis set forth above would not require proof of subjective anti-union motivation in view of the natural coercive tendency flowing from such conduct. Accordingly, I find that the Respondent violated Section 19(a)(1) of the Order by the institution and application of a policy of refusing to grant official time to necessary union witnesses for the purpose of participating in a unit determination hearing held pursuant to the Regulations of the Assistant Secretary. 13/ Further, I find that agencies are not obligated to make available on official time any employees who appear solely as union representatives. Thus, in my view, an employee who represents a union at a unit determination hearing is, in effect, working for that union and agencies should not be obligated to grant official time to such an employee.

In addition, the Hearing Examiner concluded that the Respondent's conduct in the instant case violated Section 19(a)(4) based on the view that the employees who appeared on behalf of the Complainant were accorded disparate treatment from those who testified for agency management. The Respondent took the position that the matters at issue herein had been disposed of fully by virtue of the fact that during the processing of the pre-complaint unfair labor practice charge it had restored the deducted annual leave to the 3 employees who previously had been required to take such leave to appear as witnesses at the formal unit determination hearing. As noted by the Hearing Examiner, it is undisputed that the Respondent initiated this "remedial" action because it was "persuaded /that/ an exception should be granted" in this instance. In this connection, the letter of notification of "remedial" action to the Complainant states, "/the/ rule of not permitting employees who appear on behalf of unions at representation hearings to be 'on-the-clock' would remain in effect."

13/ My finding of violation of Section 19(a)(1) of the Order is based solely on the theory enunciated herein. I do not adopt the conclusions of the Hearing Examiner that the Respondent's conduct was violative of the Order because it constituted a reminder to employees that those who testify for and thereby assist management will not sustain economic loss, but those who testify against management and thereby assist the union risk loss of compensation. Further, I do not adopt the Hearing Examiner's application of my decision in Department of Defense, Arkansas National Guard, A/SLMR No. 53, to the facts of the instant case.

In the particular circumstances of this case, I find that it would not effectuate the purposes and policies of the Order to find a violation of Section 19(a)(4). Thus, as noted above, the evidence establishes that the Respondent restored the deducted annual leave to the 3 employees involved. This remedial action already taken by the Respondent would appear to be sufficient to negate the need for any "make whole" order in this proceeding. Moreover, as discussed below, the record reveals that the Respondent stated on the record that it would make witnesses available if they were requested by either a Hearing Examiner or Hearing Officer, as the case may be.

In these circumstances, I find the Respondent's conduct has, in effect, rendered moot the question whether there has been discipline or other discrimination against the actual employees affected by the Respondent's policy herein. Accordingly, I reject the Hearing Examiner's finding that the Respondent violated Section 19(a)(4) of the Order. 14/

The Hearing Examiner concluded that it was unnecessary to determine whether the conduct at issue constituted a separate violation of Section 19(a)(2) of the Order, apparently because his Section 19(a)(1) and (4) findings would provide a full and complete remedy in this matter. The Complainant did not except to this finding. Under the circumstances, I adopt the recommendation of the Hearing Examiner and find that the Respondent's conduct did not encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment. I reach this conclusion because I view the essential right at issue to be the right to participate as a witness in formal unit determination hearings before the Assistant Secretary rather than involving membership in and activities on behalf of a labor organization.

In excepting to the Hearing Examiner's Report and Recommendations, the Respondent contended that the Hearing Examiner failed to mention that the Department of the Navy had stated on the record that it would make employee witnesses available if they were requested by either a Hearing Examiner or Hearing Officer, as the case may be. The Respondent placed great emphasis on the contention that adoption of the Hearing Examiner's

14/ However, if, in the future, an agency refuses to permit necessary employee union witnesses to testify at formal unit determination hearings on official time, which would include payment of any necessary transportation and per diem expenses, such conduct may be considered violative of Section 19(a)(4) of the Order.

findings would establish a procedure which would be subject to substantial abuse in that no protection to the agency involved was provided. 15/ In this connection, the Respondent stated in its brief that,

> If inherent controls were built in, the Department of the Navy could take a different approach in its position. The agency, based on its own appraisal, may modify or discontinue its policy as dictated by the circumstances. 16/

In reaching my determination in the instant case, I have taken into consideration the potential for abuse and the effect that such abuse would have on the efficiency of Governmental operations. In agreement with the Respondent, I find that the policy enunciated herein requires the establishment of a mechanism to effectuate its operation.

15/ In this regard, the Respondent sought to put into evidence affidavits from its officials at other locations which it asserted would disclose occasions when labor organizations had called substantial numbers of employees as witnesses in formal unit determination hearings. The Hearing Examiner refused to allow the affidavits into evidence because the affiants were not available for cross-examination, although the Respondent had offered to make the affiants available. In view of the Respondent's offer to make the affiants available, I find that the Hearing Examiner acted prematurely in denying the Respondent's motion in this respect. However, in the circumstances, I do not view the Hearing Examiner's ruling to be prejudicial to the Respondent. Thus, while I have not considered specifically the affidavits in question in deciding the subject case, I have taken notice of formal unit determination proceedings held to date pursuant to my Regulations for the purpose of ascertaining the possible cost and impact on efficiency which might result from the implementation of the principle enunciated herein.

16/ It should be noted that prior to the facts giving rise to the instant complaint, the record reveals that the Respondent had no overall practice prohibiting the granting of official time to witnesses appearing at Executive Order proceedings.

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I do not view as necessary to the orderly processing of formal unit determination cases arising pursuant to the provisions of the Executive Order any requirement that all requests for witnesses necessarily be channeled through my representatives. However, when agency management has been given notice as to those witnesses requested to participate in such a proceeding held under the Assistant Secretary's Regulations, including the reasons for their participation, and it deems that the request is unreasonable in that it exceeds what is "necessary" to the proceeding, agency management should give the requesting party written notification of its decision rejecting the request and the reasons therefor. The requesting party may then appeal such denial to either the appropriate Regional Administrator prior to the opening of the hearing, or to the Hearing Officer after the opening of the hearing. If, upon consideration of all the facts, the Regional Administrator or Hearing Officer deems that the disputed witnesses are necessary to the proceedings he may then issue a Request for Appearance of Witnesses. 17/ A refusal thereafter to make such witnesses available on official time at a formal unit determination hearing 18/ may be deemed to be violative of provisions of Section 19(a) of the Executive Order. 19/

17/ The above-described mechanism is similar to that which is utilized in certain proceedings held pursuant to Civil Service Commission Regulations and it is consistent with the type of procedure which the Respondent indicated it could accept.

18/ As with the practice in certain Civil Service Commission proceedings, the obligation to "make available" would require the payment of transportation costs and per diem, as such persons are deemed to be on duty status. These are matters which may be taken into consideration both by agency management in reaching a decision on a request, and by the Regional Administrator or Hearing Officer when reviewing a denial of a request by agency management.

19/ While the procedure described above was not followed in the instant case, I am not precluded from finding the violation discussed above. It should be noted that the Respondent at no time raised any contention that the Complainant's requests herein were unreasonable. In this regard, it is noted that the Respondent, in fact, allowed official time during the first two days of hearing, and subsequently allowed official time for the third and final day of the hearing.

The Complainant excepted only to the scope of the remedy recommended by the Hearing Examiner, contending, in essence, that inasmuch as the policy at issue was announced throughout the Department of Navy, any notices which are to be provided for should be posted at all Navy facilities subject to the Executive Order. I do not consider such a requirement necessary. Thus, compliance with the remedial order described herein will require that the Respondent make appropriate changes in its Regulations. The subsequent dissemination of such changes throughout the Department of the Navy should result in the uniform application of the principles described herein. 20/

CONCLUSION

By the implementation and effectuation of a policy of refusing to make available on official time necessary union witnesses for participation at a formal unit determination hearing held pursuant to the Regulations of the Assistant Secretary, the Respondent violated Section 19(a)(1) of Executive Order 11491. 21/ The Respondent did not, however, encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment in violation of Section 19(a)(2). Nor did the Respondent discipline or otherwise discriminate against employees because they filed a complaint or gave testimony under the Order in violation of Section 19(a)(4).

THE REMEDY

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

20/ Cf. Charleston Naval Shipyard, A/SLMR No. 1.

21/ As discussed above, the instant case arose when the Respondent declined to allow the Complainant's witnesses to be on official time when participating in a formal unit determination hearing. The Hearing Examiner's findings and recommendations on this issue were premised, in part, on the fact that the Complainant's witnesses were in attendance at a unit determination hearing which by its very nature is investigatory and not adversary. My decision in this matter is limited to the particular circumstances of the case. I have not been called upon to consider, and, therefore, do not pass upon, whether the same rationale enunciated herein would be applicable to an adversary proceeding conducted pursuant to the Assistant Secretary's Regulations under the Executive Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491 and Section 203.25(a) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Navy and the U. S. Naval Weapons Station, Yorktown, Virginia, shall:

1. Cease and desist from:

Interfering with, restraining or coercing employees by promulgating or maintaining a policy of refusing to make available on official time necessary union witnesses for participation at a formal unit determination hearing held pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Order:

(a) Take such action as is necessary in order to bring its regulations into compliance with the requirement that necessary union witnesses be made available on official time to participate in formal unit determination hearings held pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations.

(b) Post at its facility at U. S. Naval Weapons Station, Yorktown, Virginia, 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.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within ten (10) days from the date of this Order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint in Case No. 22-2330 (RO) be, and it hereby is, dismissed in its entirety.

IT IS FURTHER ORDERED that the complaint in Case No. 22-2334 (RO) be, and it hereby is, dismissed insofar as it alleges violations of Section 19(a)(2) and (4) of Executive Order 11491.

Dated, Washington, D. C.
March 6, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce employees by promulgating or maintaining a policy of refusing to make available on official time necessary union witnesses for participation at a formal unit determination hearing held pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations.

WE WILL take such action as is necessary in order to bring our Regulations into compliance with the requirement that necessary union witnesses be made available on official time for participation in formal unit determination hearings held pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations.

_____
(Agency or Activity)

Dated: _____ By _____
(Signature)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrator of the Labor-Management Services Administration, United States Department of Labor, whose address is: Room 1012, Penn Square Building, 1317 Filbert Street, Philadelphia, Pennsylvania 19107.

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

DEPARTMENT OF THE NAVY AND THE
U. S. NAVAL WEAPONS STATION

Respondent

and

INTERNATIONAL ASSOCIATION OF FIRE
FIGHTERS, AFL-CIO

Complainant.

CASE NOS. 22-2330 (RO)
22-2334 (RO)
(Consolidated)

DEPARTMENT OF THE NAVY AND THE
U. S. NAVAL WEAPONS STATION

Respondent

and

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R4-1

Complainant.

John N. Connerton, Esquire
Labor Relations Advisor,
Office of Civilian Manpower Management,
Labor Relations Disputes and Appeals Section,
Department of the Navy,
Washington, D. C. 20390, for the respondent.

Roger P. Kaplan, Esquire
Assistant General Counsel,
National Association of Government Employees,
Suite 512, 1341 G Street, N. W.
Washington, D. C. 20005, for complainant NAGE.

David S. Barr, Esquire
1000 Conn. Ave., N. W.
Washington, D. C., 20036, for complainant IAFF.

Before: Frank H. Itkin, Hearing Examiner

REPORT AND RECOMMENDATIONS

Statement of the Case

This proceeding arises under Executive Order 11491. It was initiated by a complaint filed on February 16, 1971, by International Association of Fire Fighters, AFL-CIO (herein, "IAFF"), and a complaint filed on February 17, 1971, by National Association of Government Employees Local R4-1 (herein, "NAGE"). Both complaints allege in sum that respondent Department of the Navy and the U. S. Naval Weapons Station (herein, "the Navy") violated Sections 19(a)(1), (2) and (4) of the Executive Order by requiring union witnesses to be on annual leave or leave without pay while in attendance at representation proceedings conducted pursuant to the Executive Order. On April 16, 1971, the two cases were consolidated, and on May 5, 1971, a notice of hearing on the consolidated complaints was issued by the Philadelphia Regional Administrator of Labor-Management Services Administration, United States Department of Labor. The hearing was conducted before me on June 22, 1971, at Yorktown, Virginia. All parties were represented by counsel 1/, who were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, submit oral argument and file briefs.

1/ Counsel for IAFF did not personally appear at the hearing but instead, by letter dated June 18, 1971, waived his appearance and the filing of a brief and requested that IAFF remain a party to this case and be served with all papers.

Upon the entire record in this matter, from my observation of the witnesses, and after due consideration of the briefs filed by respondent Navy and complainant NAGE, 2/ I make the following findings and conclusions:

Findings of Fact

I. The issues presented

Section 1(a) of Executive Order 11491 provides: "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* * *." Section 19(a)(1) of the Executive Order provides:"Agency management shall not interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order." In addition, Section 19(a)(2) forbids "Agency management" to "encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment." Section 19(a)(4) further forbids "disciplin[ing] or otherwise discriminat[ing] against an employee because he has filed a complaint or given testimony under this Order."

The question presented in this case is whether the Navy violated the foregoing provisions by requiring three employees who testified for the IAFF and NAGE at a representation proceeding conducted under this Order to take annual leave or leave without pay during their attendance at the hearing while, in the same proceeding, allowing witnesses who appeared at the behest of the Navy to remain on duty status. Further, since the Navy subsequently restored the annual leave used by the unions' three witnesses while in attendance at the hearings, the Navy

2/ At the request of counsel at the hearing, the time for filing briefs was extended to July 16, 1971; briefs were filed on that date by the Navy and NAGE.

now argues that the matter has been fully disposed of and there is no need for further proceedings or the requested remedial relief.

II. Background; the stipulation of the parties

At the hearing, counsel for the Navy and NAGE entered into the following stipulation:

1. On September 9 and 10, and November 4, 1970, hearings were held before Area Administrator Dow Walker in Case No. 46-1754(RO). The parties in the case were the Activity, U. S. Naval Weapons Station, Yorktown, Virginia; the Petitioner, International Association of Fire Fighters, AFL-CIO; and the Intervenor, the National Association of Government Employees. It was a representation case in which the sole issue was whether the Fire Captains in the Fire Department were supervisors within the meaning of Executive Order 11491.

2. On September 9 and 10, the Navy presented its case. All attendees in a duty status -- both management and unions -- were carried "on-the-clock", and were not required to take annual leave or leave without pay for the time they spent at the hearing.

3. On November 4, the Unions presented their case. Mr. William Hinton, who testified for IAFF, and Captain Garland W. Shackelford and Mr. Robert T. Hogge, who testified for NAGE, were "off-the-clock." These employees were given the option to take annual leave or leave without pay. Management attendees were "on-the-clock."

4. On November 10, 1970, NAGE filed an unfair labor practice charge against the U. S. Naval Weapons Station alleging that the conduct described in paragraphs 2 and 3 above constituted a violation of Sections 19(a)(1) and (4) of Executive Order 11491.

5. On November 13, 1970, the IAFF filed an unfair labor practice charge against the U. S. Naval Weapons Station alleging that the conduct described in paragraphs 2 and 3 above constituted a violation of Sections 19(a)(1), (2) and (4) of Executive Order 11491.

6. Under date of November 30, 1970, W.J. Maddocks, Captain, U.S. Navy, Commanding Officer of the Activity, wrote identical letters to Mr. Roger P. Kaplan, counsel for NAGE, and to Mr. David S. Barr, counsel for IAFF, suggesting that arrangements be made for a meeting of the parties to discuss the unfair labor practice charges referred to in paragraphs 4 and 5 above. Mr. Kaplan and Mr. Barr responded affirmatively by letters dated December 3, 1970 and December 8, 1970, respectively. The parties met on December 10, 1970 and discussed the matter in detail.

7. On December 18, 1970, Captain Maddocks rendered his decision on the charges by virtually identical letters addressed to Mr. Barr and Mr. Kaplan. The annual leave that the three employees took on November 4, 1970 was restored.

8. On February 12, 1971, IAFF and NAGE filed separate but virtually identical unfair labor practice complaints against the Navy and the U. S. Naval Weapons Station.

9. On or about March 1, 1971, the Navy submitted to the Regional Administrator a "Motion to Dismiss". 3/

3/ At the hearing, the Navy also moved to sever the consolidated complaints and dismiss the IAFF complaint because counsel for IAFF, as noted, waived appearance and the filing of a brief. On July 16, 1971, the Navy further moved for reconsideration of the Hearing Examiner's rejection of two exhibits. These motions are discussed infra.

The Assistant Secretary's decision and direction of election in the representation case, referred to above, issued on April 22, 1971, and is reported as United States Navy Department, United States Naval Weapons Station, Yorktown, Virginia, A/SLMR No. 30 (Case No. 46-1754(RO)). In that case, as stated, petitioner IAFF and intervenor NAGE sought to represent a unit of fire fighters including, inter alia, station captains at the Activity. The Activity did not contest the appropriateness of this unit but, in opposition to IAFF and NAGE, sought to exclude captains as supervisors. The Assistant Secretary found that the captains were not supervisors within the meaning of the Executive Order and therefore should be included in the unit.

Further, with reference to Captain W. J. Maddocks' decision of December 18, 1970 referred to above -- directing restoration of the annual leave used by the unions' three witnesses at the representation hearing -- the decision recites in pertinent part as follows:

* * * * *

> In granting this exception, the Office of Civilian Manpower Management pointed out explicitly that its rule of not permitting employees who appear on behalf of unions at representation hearings to be "on-the-clock" would remain in effect. Officials of that office emphasized that the exception granted should neither be interpreted as a relaxation of the Navy's general policy nor considered a precedent for decisions on similar problems which may arise in the future, and that the exception was authorized in this instance only because there were unique circumstances which warranted an exception.

* * * * *

III. The supplemental testimony of the witnesses

The parties supplemented their stipulation with the following uncontroverted testimony: 4/

4/ Proposed corrections to the transcript submitted by the Navy and unopposed by union counsel are approved and marked as Exh. A/S-14.

Ralph J. Hogge was employed at the Yorktown facility for a number of years as a progressman in the ordnance department. He was also local president for NAGE since March 1966. Hogge testified, inter alia, that he attended the representation hearings on September 9 and 10 and on November 4, 1970; that while in attendance on September 9 and 10 he was on-the-clock; and that shortly prior to November 4 Hogge's supervisor, Vernon Walker, informed Hogge "that [he] was to be at the hearing" on November 4 and "if [he] attended [he] would have to attend on [his] own time." Hogge also testified that Garland W. Shackelford, a fire captain at the facility, gave testimony for NAGE on November 4; that Shackelford previously had informed Hogge that "he [Shackelford] would not testify if he had to take time off of the clock"; and that as a consequence NAGE compensated Shackelford for his time lost on November 4. In addition, Hogge testified that William Hinton, employed as a driver-operator at the facility, attended all three days of hearings and gave testimony on the third day for IAFF; that Hinton was not carried "on-the-clock" during his attendance on November 4; and that two facility fire captains -- Sears and Brooks -- testified for the Navy at the hearings and they were not required to take annual leave or leave without pay while in attendance. As Hogge explained:

> * * * the first two days of the hearing all of managements people stayed here eight hours and on into six o'clock in the evening. I think that one evening 5:30 and the next evening was around 5:00. All of [the Navy's] people were on the clock, and at one time there was as many as eight management people in the room and of course all of them were on the clock.
>
> Then, when it came time for NAGE they said that we would not be on the clock. 5/

5/ Hogge also testified that his duty station during the hearings was less than one mile from the hearing room; that his absence from duty did not disturb or interfere with the normal procedures and functions of his station; and that the other two union witnesses worked within four miles of the hearing room on the facility. [Hogge's forename also appears as Robert in the record.]

William A. Davis, head civilian personnel officer at Yorktown, testified that in administering civilian leave procedures he is bound by, inter alia, Federal Personnel Manual letters issued by the Civil Service Commission ("FPM"); Civilian Manpower Management Instructions issued by the Department of the Navy ("CMMI"); and directives issued by the Department of Defense ("DoD"). Admitted into evidence as Exhibits N-1 through N-6 are a number of such letters, instructions and directives pertaining to various types of excused absences. Davis explained that none of these administrative promulgations expressly require or forbid the Navy to carry union witnesses who appear at such representation proceedings in an "on-the-clock" status. Davis further testified that he was first notified during late October 1970 in a telephone call from James Woodside -- labor relations advisor for the Department of the Navy assigned to the field office of Civilian Manpower Management -- that employees appearing for the unions on November 4 in the pending representation case would be carried "off-the-clock". Davis, in turn, relayed this information to Hogge's superior; to the Activity's security officer; and to the Activity's fire chief.

James Woodside, Navy advisor to some 63 activities and commands on labor relations matters, testified that during late September 1970 he was notified by the Navy's Washington Office of Civilian Manpower Management that witnesses appearing on behalf of unions in proceedings under the Executive Order would be "off-the-clock." Woodside thereafter relayed this information to the various commands and activities within his jurisdiction, including Yorktown. Woodside explained that prior to late September 1970 "[t]here really was no practice and it was left up to the discretion * * * of the activities to pay or not to pay" such witnesses.

With respect to those witnesses who appeared at the Yorktown representation hearings on behalf of the Navy, Woodside recalled that Commander Bishop, the Activity's security officer, testified on September 9 and attended on September 10 and November 4; that Davis testified on one or more days and attended all three days; that Ronald Williams, head of labor relations at the Activity, attended all three days but did not testify; that the Fire Chief attended all three days and testified on September 9 and November 4; that Captain Brooks testified and appeared only on September 9; that Captain Sears testified and appeared only on September 9; and that Captain Brown attended only on September 9 and did not testify. In addition, Woodside recalled

that Hinton and Hogge attended all three days although they only testified on November 4; and that Shackelford appeared and testified on November 4. 6/

Woodside further testified that the Navy has applied its practice of not carrying union witnesses "on-the-clock" in Department of the Navy, Naval Air Rework Facility, Alemeda, California, A/SLMR No. 49 (1971); and that, in sum, following implementation of this practice in late September 1970 the Navy has uniformly applied the practice. Further, counsel for NAGE acknowledged that there is no contention made here that the Navy has applied a different policy at other installations or facilities. 7/

In order to demonstrate problems which the Navy has encountered or arguably may encounter in carrying union witnesses "on-the-clock" during representation cases, Joseph G. Angel, head of employee relations at the Norfolk Shipyards, related his experiences in the representation proceeding conducted there during August 1970. Angel testified that hearings were held on August 17 through 21, and on August 25 and 26, 1970; that 21 witnesses appeared for both unions; that there were an average of seven union witnesses present each day of the hearings; that only two witnesses were present for the full

6/ On rebuttal, Hogge recalled that Captain Brooks was present on the first and second days of the hearings although Brooks only testified on the second day. I do not regard this and similar conflicts in testimony as significant, and therefore credit the essentially unrefuted testimony of Hogge, Davis, Woodside, and Angel as a composite explanation of the events related.

7/ Woodside also related, inter alia, his experiences in the private sector when employed by unions. Woodside recalled that the unions paid the compensation for their own witnesses in representation proceedings before the National Labor Relations Board. Consequently, Woodside stated, "we had to limit ourselves to the number of witnesses that we called to representation hearings" because the union could "only pay from funds available * * *."

hearing; that 21 union witnesses testified from one-half hour to six hours; and that a unit of approximately 7500 employees was involved. 8/

Conclusions

I. The contentions of the parties

NAGE argues that the Navy's practice of requiring union witnesses to be on annual leave or leave without pay while attending representation proceedings under this Executive Order -- although permitting agency witnesses attending the same proceedings to remain on duty status -- interferes with, restrains and coerces employees in the exercise of rights assured them by the Executive Order, in violation of Section 19(a)(1) of the Order; discourages membership in a labor organization by discrimination in regard to conditions of employment, in violation of Section 19(a)(2) of the Order; and "is inherently discriminatory and disciplines [union witnesses] solely because [they have] given testimony under the Order," in violation of Section 19(a)(4) of the Order. NAGE also argues that the Assistant Secretary should not adopt "the policy in the private sector that requires each union to pay its own witnesses at hearings conducted before the" National Labor Relations Board; and, further, that the Navy should be directed, inter alia, to post notices to the effect that it will cease and desist from engaging in the above unfair labor practices.

The Navy argues that there is no obligation in law, rule, regulation or the Executive Order itself requiring an agency to pay union witnesses for testifying at such proceedings; that therefore an agency may, as here, establish a practice wherein it will not pay employees for attendance at hearings as union witnesses; that such a

8/ The Navy also offered the affidavit of Geoffrey D. Spinks, an advisor, to show related data with respect to the Naval Air Rework Facility case supra, A/SLMR No. 49. Such evidence at best has limited probative value, and since Spinks was not available for cross-examination, I rejected this exhibit [Exh. N-7]. I also rejected the affidavit of Joseph Amann assertedly relating his experiences in representation matters, because he too was not available for cross-examination [Exh. N-8].

The Navy's post-hearing motion to reconsider rejection of Exhibits N-7 and N-8 (marked as Exh. A/S-13) is denied since the affiants were not available for cross-examination.

practice "would be presumptively valid unless there is evidence of discriminatory intent and/or disparity in its application"; and that, "[a]bsent these factors, the rule and its application must be considered valid." The Navy also argues that it "has absolutely no control over the number of witnesses to be used by a union at" such hearings and, assertedly, "unions could request [that] any number of employee witnesses be present at any type of hearing"; that the practice adopted by the Navy here "is no different from the private sector"; and finally that the "intent behind Section 20" of the Executive Order "is that Government should not support employees engaged in internal union business."

II. The violations of Sections 19(a)(1) and (4) of the Executive Order

The Assistant Secretary, in Department of Defense, Arkansas National Guard, A/SLMR No. 53 (1971), recently restated the controlling principles in determining whether certain conduct constitutes a violation of Section 19(a)(1) of the Order. In that case, the issue presented was whether a document posted on an employee bulletin board, disparaging an employee who had filed a grievance, constituted proscribed interference with employee protected activities. The Assistant Secretary stated:

> * * * I find that the publication of the memorandum, in and of itself, irrespective of the subjective motivation prompting such, necessarily and effectively constituted an inherent interference, restraint and coercion of employees in the exercise of rights assured by the Order. * * * In all the circumstances, the logical impact of the text was to instill in the employees a fear of the adverse effects of filing grievances and to undermine the union. Such an effect would tend to discourage exercise of the freedom of employees to form, join, or assist labor organizations, rights which are guaranteed by Section 1(a) of the Order, rights the abridgements of which are proscribed by Section 19(a)(1) of the Order.

Applying this same rationale to the instant case, I find that the Navy's practice of requiring union witnesses to take annual leave or leave without pay while attending representation proceedings, although permitting agency witnesses to remain on-the-clock, "in and of itself, irrespective of the subjective motivation prompting such, necessarily and effectively constituted an inherent interference, restraint and coercion of employees in the exercise of rights assured by the Order" (ibid.). The Preamble to the Executive Order makes it clear that "the 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" and, further, that "the participation of employees should be improved through the maintenance of constructive and cooperative relationships between labor organizations and management officials." And, as stated, Section 1(a) of the Order guarantees each employee "the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization * * *."

The Navy's practice in this case of allowing only its witnesses at representation proceedings to remain on-the-clock is contrary to the purposes and policies stated in the Preamble and Section 1(a) of the Executive Order. This agency practice will plainly discourage employees from giving relevant testimony in such proceedings, testimony which may be necessary to effectuate the purposes and policies of the Executive Order. Thus, for example, in this case Fire Captain Shackelford made clear to the union's representative that "he would not testify if he had to take time off the clock." If the unions didnot have sufficient funds available to compensate such witnesses, the Assistant Secretary would have been deprived of otherwise relevant testimony necessary to his determination.

In addition, the Navy's practice of compensating only its witnesses serves as a dramatic reminder to its employees that those who testify for and assist management will not sustain any economic loss, but those who testify against management and thus assist the unions risk a loss of compensation. In short, as the Assistant Secretary reasoned in Arkansas National Guard, "the logical impact of" this conduct "was to instill in the employees a fear of the adverse effects of [there, filing grievances; here, giving testimony] and to undermine the union. Such an effect would tend to discourage exercise of the freedom of employees to form, join, or assist labor organizations * * *," in violation of Section 19(a)(1) of the Executive Order.

The employees' "right to assist a labor organization" is further protected by Section 19(a)(4) of the Executive Order. That section forbids agency management to "discipline or otherwise discriminate against an employee because he has * * * given testimony under this Order." Disparate treatment of employees because of their having given testimony in a representation proceeding not only interferes with the basic rights of the employees protected by Section 1(a) of the Executive Order, but -- no less than other methods by which witnesses in other forums may be intimidated -- interferes with the administration of law. Therefore, witnesses who give testimony on behalf of unions in such proceedings may not be put in, or risk being put in, jeopardy because of their testimony. In protecting such witnesses, we not only encourage the giving of relevant testimony, but also protect the Executive Order from erosion which would necessarily follow if witnesses who testified for unions and against agency management at such proceedings could be placed in economic jeopardy.

In the instant case, the three witnesses who testified for the unions risked losing their compensation although the witnesses who testified for agency management faced no such loss. I find that agency management by this conduct has discriminated against the three employees appearing for the unions because they exercised their protected right of giving testimony, in violation of Section 19(a)(4) of the Order. 9/

The Navy -- referring to a number of administrative promulgations generally governing excused absences set forth in Exhibits N-1 through N-6 and the general enabling statutory authority contained in 5 U.S.C. Sec. 6322 -- acknowledges in its post-hearing brief (pp. 5-11) that "a reading of the various rules and regulations, instructions and directives under which the activities operate and a reading of the statute itself clearly show that there is no requirement to pay employees for time spent as union witnesses at a representation hearing." However, the absence of an explicit requirement in the

9/ Having found a violation of Sections 19(a)(1) and (4) of the Executive Order, it is unnecessary to determine whether the same conduct would also constitute a separate violation of Section 19(a)(2) of the Order.

administrative promulgations or the enabling statute does not permit the Navy to engage in conduct otherwise violative of Sections 19(a)(1) and (4) of the Executive Order. Cf. Charleston Naval Shipyard, A/SLMR No. 1, p.4 (1970), where the Assistant Secretary "reject[ed] the Shipyard's assertion that [the Assistant Secretary is] without authority to determine whether directives or policy guidance issued by the Civil Service Commission, Department of Defense or any other activity are violative of the Order when those directives or policies are asserted by the activity as a defense to allegedly violative conduct." Moreover, I note that the cited administrative promulgations permit an agency to excuse the absence of an employee while, inter alia, "serving as representative of an employee organization * * * to receive information, briefing or orientation relating to matters of mutual concern to the employing agency and the employee in his capacity as an organization representative * * *" (see, generally, Exhibits N-1 and N-2), and permit an agency to excuse an "employee who is an official or representative of a labor organization holding formal or exclusive recognition * * * in conjunction with attendance at a training session sponsored by that organization, provided the subject matter of such training is of mutual concern to the Government and the employee in his capacity as an organization representative and the Government's interest will be served by the employee's attendance***" (see, generally, Exhibit N-6). These promulgations, in effect, support a determination that union witnesses be compensated while testifying in representative proceedings because the giving of such testimony "is of mutual concern to" all parties and "the Government's interest will be served by the employee's attendance" (ibid.). 10/

10/ The Navy also argues that the "intent behind Section 20 is that the Government should not support employees engaged in internal union business." Section 20 of the Executive Order provides:

> ***Solicitation of membership or dues, and other internal business of a labor organization, shall be conducted during the non-duty hours of the employees concerned. Employees who represent a recognized labor organization shall not be on official time when negotiating an agreement with agency management. [Emphasis added.]

This Section is not controlling here. Giving testimony at a representation hearing is not "internal business" of a union or related to the time-consuming process of negotiating a contract. Moreover, I note that the policy contained in Section 20 is at least in part being reconsidered by the Federal Labor Relations Council. See, Requests for Interpretations and Policy Statements, No. 10, June 30, 1971, FLRC No. 70 P-3.

In addition, the Navy seeks to justify its practice of not compensating union witnesses because assertedly it "has absolutely no control over the number of witnesses to be used by a union" or "the amount of time spent by witnesses" at a hearing; "[w]ithout any type of controls, which inherently must have a limiting effect, unions could request any number of employee witnesses be present at any type of hearing;" and, consequently, if these employees were compensated by the agency "unions would capriciously at will request any number of employee witnesses regardless of whether they were needed or not." The record in the instant case does not support this assertion. The three union witnesses were reasonably needed to give relevant testimony. Their attendance was not unreasonable under all the circumstances of this case, especially when compared with the roster of witnesses and other persons attending for the Navy. Further, the Navy is not "absolutely" without control as it argues. When and if a case arises where a union capriciously or unreasonably requests a large number of witnesses to attend such hearings, counsel for the activity may oppose the union's request for appearance of the witnesses on the grounds that "the anticipated testimony [does not] appear to be reasonably related to the matters under investigation * * *," under Rule 205.6 of the Rules and Regulations. In addition, counsel for the activity in such a case may also request other appropriate and related protective relief in order that the appearance of employee witnesses not unreasonably interfere with the mission and operation of the agency involved. See, generally, Rule 203.15(a), (d), (e), (g), and (m).

The Navy argues that its practice here is no different than that used in the private sector. The Navy cites, inter alia, the testimony of Mr. Woodside summarized above, and Sections 102.32 and 102.66(g) of the Rules and Regulations of the National Labor Relations Board providing generally that witness fees and mileage "be paid by the party at whose instance the witness appears." The Navy also cites the Labor Board's recent decision in Electronic Research Co., 190 NLRB No. 143 (1971), where the Board stated:

> The earlier unfair labor practice proceeding was an adversary one in which each side subpoenaed or called its own witnesses and compensated them for their time. In these circumstances to order respondent [employer] to pay the employees for time lost from work in testifying against it is to require a litigant in effect to subsidize its opponent. In our view Section 8(a)(4) [of the N.L.R.A.] was never intended by Congress to impose such a burden upon a respondent employer.

NAGE, in its post-hearing brief, does not seriously dispute that in the private sector each party generally compensates its own witnesses. However, NAGE argues that the practice in the private sector should not be adopted in the public sector and, further, the Labor Board's decision in Electronic Research is inapposite here.

As stated, the Preamble to the Executive Order makes it clear that the "well-being of employees and the 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." Thus, unlike the private sector, the Government stands to benefit from employee testimony in cases such as the instant one. Moreover, unlike the factual situation existing in the Electronic Research case, we are involved here with testimony given at representation hearings which, as stated in Rule 202.9(b), "are considered investigatory and not adversary. Their purpose is to develop a full and complete factual record." Accordingly, I would not apply the practice existing in the private sector and, as stated, the Electronic Research case is distinguishable. See, Charleston Naval Shipyard, supra.

Finally, the Navy argues that this entire matter was fully disposed of "in that a satisfactory settlement had been made" because "the witnesses were made whole for the time spent at the November 4, 1970 hearing." However, the letter decision of Captain Maddocks, as noted, made clear that the Navy would apply this same practice again. Consequently, the Navy should be directed to post a notice stating that it will cease and desist from engaging in the foregoing and like or related conduct violative of Sections 19(a)(1) and (4) of the Executive Order. See, Department of Defense, Arkansas National Guard, supra; United States Army School/Training Center, Fort McClellan, Alabama, A/SLMR No. 42 (1971); Charleston Naval Shipyard, supra. 11/

11/ The Navy moved on March 1, 1971 to dismiss the above case making essentially the same contentions discussed above. For the reasons stated above, I would dismiss that motion.

The Navy, as noted, also moved to sever the consolidated proceedings and dismiss the IAFF complaint because counsel for IAFF waived his appearance and the filing of a brief in the instant case. IAFF counsel, in a letter dated June 28, 1971 (Exh. A/S 12) opposes this motion. The undisputed facts applicable to NAGE are equally applicable to IAFF. The same remedy would be recommended whether or not the severance and partial dismissal were granted. Moreover, the essential facts--wholly apart from the stipulation at the hearing--are undisputed. Accordingly, the Navy's motion to sever and dismiss is without substantial basis and would not effectuate the purposes and policies of the Executive Order. Cf. Veteran's Administration Hospital, A/SLMR No. 81 (1971).

In sum, I conclude that the Navy has violated Sections 19(a)(1) and (4) of the Executive Order by the foregoing conduct.

RECOMMENDATION

In view of my findings and conclusions stated above, I make the following recommendations to the Assistant Secretary:

A. That respondent's motion to dismiss filed on March 1, 1971, be denied;

B. That respondent's motion to sever and dismiss the complaint of IAFF filed on June 22, 1971, be denied;

C. That respondent's motion to reconsider certain evidentiary rulings made during the hearing filed on July 16, 1971, be denied; and

D. Having found that respondent has engaged in conduct proscribed by Section 19(a)(1) and (4) of the Executive Order, that it would be appropriate for the Assistant Secretary to adopt the following order which is designed to effectuate the policies 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 Department of the Navy and the U. S. Naval Weapons Station, respondent herein, shall:

1. Cease and desist from:

   (a) Requiring employees who attend representation proceedings conducted under Executive Order 11491 at the request of a union to take annual leave or leave without pay during their attendance at such hearings;

   (b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of rights assured by Section 1(a) of Executive Order 11491; and

   (c) In any like or related manner, discriminating against employees because they have given testimony under Executive Order 11491.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Order:

   (a) Post at its facilities at U. S. Naval Weapons Station, Yorktown, Virginia, copies of the attached notice marked "Appendix." Copies of said notice shall be signed by the Commanding Officer and shall be posted and maintained by him for sixty (60) days thereafter, in conspicuous places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

   (b) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within ten (10) days from the date of this Order as to what steps have been taken to comply herewith. 12/

12/ No make-whole remedy is recommended because, as stated, respondent agency has already restored the leave used by the three employees involved.

Dated, Washington, D. C.,
AUGUST 16, 1971

FRANK H. ITKIN
HEARING EXAMINER

APPENDIX

(Notice recommended for adoption by the Assistant Secretary)

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, LABOR-MANAGEMENT RELATIONS in the FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT require any of our employees who attend representation proceedings conducted under Executive Order 11491 at the request of a union to take annual leave or leave without pay during their attendance at such hearings.

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

WE WILL NOT in any like or related manner discriminate against our employees because they have given testimony under Executive Order 11491.

_____
(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 of the Labor-Management Services Administration, United States Department of Labor, whose address is: U. S. Department of Labor, 704 Penn Square Building, 1317 Filbert Street, Philadelphia, Pennsylvania 19107.

March 20, 1972

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

DEPARTMENT OF THE NAVY,
NAVAL TRAINING DEVICE CENTER,
PROCUREMENT SERVICES OFFICE,
ORLANDO, FLORIDA
A/SLMR No. 140

This case arose as the result of a petition filed by Local 2728, American Federation of Government Employees, AFL-CIO (AFGE) seeking a unit of nonprofessional General Schedule employees in the Procurement Services Office of the Naval Training Device Center (NTDC). The NTDC is a tenant organization of the Naval Training Center, Orlando, Florida. The Activity contested the appropriateness of the unit sought by the AFGE, contending that the personnel of the Procurement Services Office did not possess a clear and identifiable community of interest apart from other NTDC employees, and that an appropriate unit would consist of all NTDC employees, including those in the NTDC Regional Offices. The Intervenor, Local 1451, National Federation of Federal Employees (NFFE), took the position that an appropriate unit would consist of all NTDC employees located at the Naval Training Center in Orlando.

The Assistant Secretary found that the functions performed by the Procurement Services Office personnel were part of a highly integrated process designed to fulfill the Activity's mission. He noted that Procurement Services Office personnel have substantial work contacts with employees of other directorates and offices in the performance of their duties. Moreover, it was found that all NTDC employees are serviced by the same personnel office and are subject to the same personnel policies and procedures, including the same promotion program and reduction in force procedures; that employee interchange occurs between directorates and offices of the NTDC, and that certain skills possessed by Procurement personnel are not unique among certain other NTDC personnel.

In these circumstances, the Assistant Secretary concluded that the employees in the unit sought by the petition did not possess a clear and identifiable community of interest separate and apart from other NTDC employees and that such a unit could not reasonably be expected to promote effective dealings and efficiency of agency operations. Accordingly, he ordered that the petition be dismissed.

A/SLMR No. 140

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
NAVAL TRAINING DEVICE CENTER,
PROCUREMENT SERVICES OFFICE,
ORLANDO, FLORIDA

Activity

and

Case No. 42-1604 (RO 25)

LOCAL 2728, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Petitioner

and

LOCAL 1451, NATIONAL FEDERATION
OF FEDERAL EMPLOYEES

Intervenor

DECISION AND ORDER

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

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

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

2. The Petitioner, Local 2728, American Federation of Government Employees, AFL-CIO, herein called AFGE, seeks an election in a unit of all General Schedule personnel employed in the Procurement Services Office of the Naval Training Device Center (NTDC), excluding all professional employees, Wage Grade employees, supervisors, management officials, guards, and employees engaged in Federal personnel work in other than a purely clerical capacity.

The Activity disputes the petitioned for unit contending that the appropriate unit should consist of all nonprofessional General Schedule and Wage Grade employees of the NTDC, including employees of the NTDC's Regional Offices. The Intervenor, Local 1451, National Federation of Federal Employees, herein called NFFE, takes the position that the appropriate unit should consist of all employees of the NTDC located at the Naval Training Center, Orlando, Florida.

The NTDC is one of a number of tenant activities at the Naval Training Center in Orlando, Florida. It is engaged in the development of training devices for use by the Armed Forces, although the construction of such devices is performed by private contractors. Organizationally, the NTDC is subdivided into seven major components: Office of the Comptroller; Procurement Services Office; Manpower, Management and Support Directorate; Engineering Directorate; Logistics and Field Engineering Directorate; Research and Technology Directorate; and Requirements, Plans and Programs Directorate.

The NTDC is located in 43 buildings at the Naval Training Center, Orlando. It employs approximately 1128 civilian employees, of whom some 898 are located at the Naval Training Center, Orlando. The Procurement Services Office, in which the employees in the claimed unit are located, contains approximately 59 employees. Of this number, those claimed by the AFGE to constitute an appropriate unit include 21 Contract Negotiators, 4 Secretaries, 9 Procurement clerks, 1 Procurement Assistant and 8 other clerks. 1/

The record reveals that, in the performance of their duties, employees of the Procurement Services Office have substantial job contacts with employees in other directorates of the NTDC and that the work of all the directorates and offices of the NTDC is highly interrelated. Thus, in the development of training devices there are four phases in which the directorates and offices participate in varying degrees: conceptual, definition, acquisition, and operational. After initial analysis of the project by the Requirements, Plans and Programs Directorate, a project team consisting of representatives from the various directorates, including the Procurement Services Office, is formed. This project team follows the progress of the device from its inception through its construction, usage and eventual disposal. The record reveals that at all stages of the development and use of the device there is substantial interaction between the various directorates and offices.

1/ In view of my disposition of this case, I find it unnecessary to rule on the stipulation of the parties which would exclude approximately 16 employees from the proposed unit on the grounds that they are supervisory, professional or management officials.

The evidence discloses that all NTDC employees are serviced by the same Civilian Personnel Office, are subject to the same competitive area under the merit promotion program, are subject to the same reduction in force procedures and receive the same fringe benefits. Further, employees have been promoted from certain directorates and offices to other directorates and offices of the NTDC and there has been employee interchange between the various directorates and offices of the NTDC, including the Procurement Services Office. Personnel records for all the NTDC employees are maintained by the same office, and training courses in procurement, offered by the NTDC, are open to and taken by persons other than those assigned to the Procurement Services Office. The record reveals also that requirements for the clerical series in the Procurement Services Office are identical to those needed for entry into other clerical series within the NTDC.

The evidence establishes that the work of each directorate and office of the NTDC is dependent upon the interaction and cooperation of the various segments of the NTDC and that each performs a necessary part of the integrated work process so that the NTDC may fulfill its mission. In addition, the record reflects that employees in the petitioned for unit have continuous and substantial work contacts with other personnel of the NTDC; that all NTDC employees are serviced by the same central personnel office and are subject to the same personnel policies and procedures, including the promotion program and reduction in force procedures; that employee interchange occurs between directorates and offices of the NTDC; and that procurement training is open to non-procurement employees. In these circumstances, I find that the employees in the unit sought by the AFGE lack a clear and identifiable community of interest separate and apart from other NTDC employees, and that such a unit limited to employees of one office of the NTDC could not be reasonably expected to promote effective dealings and efficiency of agency operations. Accordingly, I shall dismiss the petition herein.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 42-1604 (RO 25) be, and it hereby is, dismissed.

Dated, Washington, D. C.
March 20, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

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

INTERNAL REVENUE SERVICE,
NATIONAL OFFICE, OFFICE
OF INTERNATIONAL OPERATIONS
A/SLMR No. 141

The Petitioner, National Association of Internal Revenue Employees, Chapter 83, and the National Association of Internal Revenue Employees (NAIRE) sought an election in a unit composed of all of the Activity's professional and nonprofessional employees assigned to the Office of International Operations (OIO) of the National Office of the Internal Revenue Service. The Activity contested the appropriateness of the unit contending that OIO employees did not possess a clear and identifiable community of interest apart from other employees in the remaining 24 divisions of the National Office.

The Assistant Secretary determined that the proposed unit was not appropriate for the purpose of exclusive recognition. He noted that while OIO was engaged in administering the international aspects of the Federal Income Tax laws and performed both staff and operational functions and the other 24 divisions in the National Office were engaged exclusively in performing staff functions which related to the administration of the domestic aspects of the Federal income tax laws, such distinction was offset by the fact that OIO and other National Office employees shared similar skills and working conditions; had the same fringe benefits; were subject to the same personnel policies and procedures; performed similar functions; at times worked together on the same projects; and a substantial amount of employee interchange between the OIO and other National Office divisions existed. The Assistant Secretary noted also that there was a close working relationship between the OIO and other National Office divisions. In these circumstances, the Assistant Secretary concluded that the employees sought by NAIRE did not possess a clear and distinct community of interest separate and apart from other National Office employees and that such a unit would not promote effective dealings and efficiency of agency operations. Accordingly, he ordered that the petition be dismissed.

A/SLMR No. 141

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE,
NATIONAL OFFICE, OFFICE OF
INTERNATIONAL OPERATIONS 1/

Activity

and

Case No. 22-2591

NATIONAL ASSOCIATION OF INTERNAL REVENUE
EMPLOYEES, CHAPTER 83, and the NATIONAL
ASSOCIATION OF INTERNAL REVENUE EMPLOYEES

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Madeline Jackson. The Hearing Officer's rulings are free from prejudicial error and are hereby affirmed. 2/

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

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

2. National Association of Internal Revenue Employees, Chapter 83, and the National Association of Internal Revenue Employees, herein called NAIRE, seek a unit consisting of all of the Activity's professional and nonprofessional employees assigned to the Office of International Operations, herein called OIO, excluding employees located in foreign offices and in Puerto Rico, employees in the Intelligence Division, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, guards and supervisors as defined in the Order. The Activity contends that a unit limited to the OIO, which is one of 25 divisional offices in its National Office, is inappropriate in that the OIO employees do not possess a clear and identifiable community of interest apart from other National Office employees. The Activity further contends that the requested unit is based on the NAIRE's extent of organization and that, if granted, the unit would not promote effective dealings and efficiency of operations. On the other hand, the NAIRE asserts that OIO employees possess a separate and distinct community of interest apart from other National Office employees because of their different skills and functions. Additionally, the NAIRE contends that the claimed unit is appropriate because it is functionally the equivalent of the Internal Revenue Service District Offices which have been found to be appropriate for the purpose of exclusive recognition under the Executive Order.

The Internal Revenue Service, herein called IRS, is responsible for administering the Federal income tax laws. It is divided into a National Office, which is responsible primarily for staff functions, and Regional and District offices, which are responsible primarily for operational functions. Specifically, the National Office is responsible for formulating IRS policy, and for planning, programming and evaluating IRS functional responsibilities. Its employment complement consists of approximately 1700 rank and file employees. Of these 1700, approximately 360, 3/ including some 115 professional employees, 4/ are employed by the OIO at its Washington, D.C. location.

The National Office of the IRS is under the administration of a commissioner who is assisted by six assistant commissioners.

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

2/ Because all parties were afforded the opportunity to ascertain the factual basis for the witnesses' testimony, I reject the Activity's contention that the Hearing Officer erred in questioning certain witnesses concerning their opinions as to whether the proposed unit would promote effective dealings and efficiency of agency operations.

3/ Approximately 250 employees are considered eligible for inclusion in exclusively represented units.

4/ The parties stipulated and the record established that by virtue of their training, skills, educational background and duties, employees occupying the classifications of Attorney (Estate and Gift Tax), Tax Auditor, Internal Revenue Agent, Revenue Officer and Tax Law Specialist are professional employees within the meaning of the Executive Order, who may not be included in a unit with nonprofessionals unless a majority votes for inclusion in such a unit.

The Office is divided into six administrative offices: Compliance; Inspection; Technical Assistance; Administration; Planning and Research; and Accounts, Collection and Taxpayer Service (herein called ACTS), each of which is headed by an assistant commissioner. The six administrative offices are, in turn, divided into 25 divisions, each of which is responsible for one or more facets of the National Office's functions. The divisions are supervised by directors who report to the assistant commissioners.

The OIO, which is one of five components under the jurisdiction of the Assistant Commissioner for Compliance, is the only component in the National Office which has operational as well as staff functions. It is engaged in administering the Federal income tax laws in all areas of the world outside the United States and is responsible for the returns filed by foreign corporations doing business in the United States, and for tax returns filed by American citizens residing abroad. Also, it has jurisdiction over income which flows to points outside the United States which is subject to the Federal income tax laws. The OIO consists of an administrative office and four divisions: the Collection Division; the Audit Division; the Foreign Operations Division; and the Research, Tax Treaty and Technical Services Division. The Collection and the Audit Divisions perform primarily operational functions, while the Foreign Operations Division and the Research, Tax Treaty and Technical Services Division perform staff functions.

The Collection Division of the OIO is responsible for collecting delinquent accounts, securing delinquent returns from taxpayers, maintaining certain tax records, and rendering assistance to taxpayers subject to the jurisdiction of the OIO. The Audit Division is responsible for examining tax returns for the purpose of determining the correct liability of those taxpayers whose returns it examines. 5/ The Foreign Operations Division supervises the OIO's foreign posts, prepares the work program for these posts and processes all of their correspondence. It also conducts military tax assistance programs for military personnel stationed abroad and serves as the focal point of IRS communications with foreign governments and embassies on matters concerning the income of aliens which is subject to Federal income tax laws. In addition,it controls foreign travel by all IRS employees. The Research, Tax Treaty and Technical Services Division serves as an innovator of international tax policy and provides technical services and advice on international tax matters to the other divisions of the OIO and to the IRS, as well as the entire Treasury Department.

The record discloses that while the OIO is concerned primarily with the international aspects of Federal income tax laws and all other National Office divisions are concerned primarily with the domestic aspects of such laws, there is a close functional and administrative relationship between the OIO and the other National Office divisions. Thus, the Director of the OIO attends all staff meetings held in the Office of the Assistant Commissioner for Compliance and acts as advisor on international tax matters not only for the Assistant Commissioner for Compliance, but for the entire National Office. The OIO performs technical studies in collaboration with various divisions of the National Office, including the Planning Division located in the Office of Planning and Research, and with international specialists in the Office of the Chief Counsel of the IRS. Also, OIO employees frequently receive guidance, technical assistance and supervision from other National Office divisions which are engaged in performing functions which are similar to those performed by OIO employees. 6/ The evidence further reveals that the OIO is required to submit all requests for personnel to the Assistant Commissioner for Compliance who, in turn, coordinates such requests with those of the other Assistant Commissioners and Division Directors. In addition, the Collection Division of the OIO and the National Office Collection Division, which is under the jurisdiction of the Assistant Commissioner for ACTS, obtain manpower from a common pool and all OIO Collection Division employee requests are subject to approval of the ACTS Collection Division. The Public Information Division of the National Office performs public information functions for all National Office divisions including OIO, and the Training Division of the National Office performs training functions for all National Office divisions.

The record discloses that the OIO shares common personnel policies, practices, and procedures with other National Office divisions. Such matters are determined by the National Office Branch of the Personnel Division which is under the jurisdiction of the Assistant Commissioner for Administration. All personnel activities such as recruitment, placement, employee relations, and servicing of personnel records in the National Office are conducted

5/ The functions of the Collection and the Audit Divisions are essentially the same as those performed by IRS field offices with respect to the Federal income tax laws applicable to taxpayers residing within the United States.

6/ The Audit Division of the OIO is under the functional control of the National Office Audit Division.

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by the National Office Personnel Office. Also, the Personnel Office drafts position descriptions for National Office employees, including those employed by the OIO, and the Assistant Commissioner for Administration has the authority to determine their duties. While the Director of the OIO has the authority to select OIO employees, the record reveals that such authority is subject to approval of the National Office Branch of the Personnel Division which has appointing authority. The authority of the Director of the OIO in hiring is the same as that possessed by other division directors in the National Office. All regulations and procedures for hours of work, leaves of absence, work shifts, promotions, holiday work, incentive awards, restrictions on outside employment, processing of employee grievances, and fringe benefits are the same for all National Office employees. Moreover, the record reveals that all authority for conducting labor relations is vested in the National Office Personnel Office.

While the area of consideration for promotions in the OIO is generally OIO-wide, employees in other National Office divisions may compete for OIO positions and, in turn, OIO employees may compete for vacancies in all divisions of the National Office. Also, OIO employees possess seniority rights on a National Office-wide basis which would permit them to "bump" employees in other divisions under certain circumstances. The record further reveals that all but four of the twenty-two employee classifications found in the OIO are found elsewhere in the National Office, and that most of the OIO's employees are interchangeable with other National Office employees who occupy the same job classifications.

The evidence establishes that there is a substantial amount of employee interchange between the OIO and other National Office divisions. In this connection, clerical employees are frequently detailed from the OIO to other National Office divisions and OIO professional employees frequently are detailed elsewhere in the National Office to work on particular studies. Moreover, the record reveals that there have been a substantial number of employee transfers between the OIO and other National Office Divisions.

Based on the foregoing, I find that OIO employees do not possess a clear and identifiable community of interest separate

and apart from other unrepresented National Office employees. 7/ Thus, as discussed above, the record reveals that OIO employees and other employees of the National Office share the same basic skills and fringe benefits, perform similar functions, and are subject to the same personnel practices and procedures. Further, there is a close working relationship between the OIO and other National Office employees, a substantial amount of employee interchange between the OIO and other National Office divisions and promotional opportunities and seniority rights exist on a National Office-wide basis. Finally, the evidence establishes that the authority for labor relations is at the National Office level and major personnel policies and procedures are developed at the National Office level. In these circumstances, I find that the unit petitioned for is not appropriate for the purpose of exclusive recognition and that such a unit would not promote effective dealings and efficiency of agency operations. 8/ Accordingly, I shall dismiss the petition herein.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 22-2591 be and it hereby is, dismissed.

Dated, Washington, D.C.
March 20, 1972

W.J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

7/ While the Activity has granted exclusive bargaining rights to separate bargaining units at the IRS Data Center in Detroit, Michigan, and the Computer Center, in Martinsburg, West Virginia, both of which are under the Assistant Commissioner for ACTS, I find that establishment of such individual units is not dispositive of the unit issue in the instant case. The employees in those recognized units have only a limited relationship with other National Office employees. Thus, not only are the employees in those units geographically separated from other employees of the National Office, but for the most part, they handle administrative matters, and most of the employees in these offices are engaged in work of a different nature than the work performed by other employees of the National Office.

8/ In view of the OIO employees' lack of a clear and identifiable community of interest separate and apart from other National Office employees, the fact that there are certain similarities between the function of the OIO and that of IRS field offices was not considered to require a contrary result.

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

SOCIAL SECURITY ADMINISTRATION,
BUREAU OF HEARINGS AND APPEALS
A/SLMR No. 142

This case involved a representation petition filed by the Association of HEW Hearing Examiners (Association) seeking a unit of all Social Security Administration Hearing Examiners assigned to the Activity's offices throughout the United States and Puerto Rico. The Activity sought the dismissal of the petition on the basis that Hearing Examiners were supervisors within the meaning of Section 2(c) of the Executive Order and that the Association did not qualify as a labor organization.

The Activity's Hearing Examiners are located in some 69 Hearing Examiner offices located in the United States and Puerto Rico. The basic working unit in each office consists of a Hearing Examiner and at least two support personnel, a Hearing Assistant and at least one secretary.

The Assistant Secretary found that Hearing Examiners were supervisors within the meaning of the Order because they assigned and directed the work of the support staff in their working unit, they prepared performance evaluations and other evaluative reports on the support staff, and they effectively recommended such personnel actions as hiring, promoting, and granting of awards. Because a unit of Hearing Examiners would include only supervisors, the Assistant Secretary found it inappropriate for the purpose of exclusive recognition. In addition, he found that the Association did not qualify as a "labor organization" within the meaning of Section 2(e)(1) of the Order as it consisted solely of supervisors.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

SOCIAL SECURITY ADMINISTRATION,
BUREAU OF HEARINGS AND APPEALS

Activity

and

Case No. 22-2637

ASSOCIATION OF HEW
HEARING EXAMINERS

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Leo A. Glunk. 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:

1. The Association of HEW Hearing Examiners, herein called the Association, which asserts that it is a labor organization within the meaning of the Executive Order, claims to represent certain employees of the Activity.

2. The Association seeks an election in a unit of all Social Security Administration Hearing Examiners assigned to the Activity's offices throughout the United States and Puerto Rico, excluding all

1/ In view of the disposition of the subject case, I find it unnecessary to consider whether the Hearing Officer erred, as contended by the Activity, in limiting testimony concerning the status of the Petitioner as a "labor organization" to the single issue whether HEW Hearing Examiners are supervisors within the meaning of the Order.

management officials, supervisors, employees engaged in Federal personnel work in other than a purely clerical capacity, nonprofessional General Schedule employees, and guards. 2/

The Activity contends that employees classified as Hearing Examiners are supervisors within the meaning of Section 2(c) of the Executive Order, that the Association does not qualify as a labor organization under Section 2(e)(1) of the Order, and further, that under Section 1(b) of the Order, Hearing Examiners, as supervisors, must be excluded from participating in the management of the Association or acting as its representative, if the Association is found to be a labor organization, because such participation would result in a conflict or apparent conflict of interest and would be incompatible with the official duties of such employees under the Administrative Procedure Act.

The Bureau of Hearings and Appeals (BHA) is a constituent bureau of the Social Security Administration, Department of Health, Education, and Welfare. The primary function of the BHA is to provide a fair hearing to each individual who applies for benefits under Title II and Title XVIII of the Social Security Act, as amended, and Title IV of the Federal Coal Mine Health and Safety Act of 1969, in accordance with Title V, U.S. Code, Section 554. An Appeals Council also is provided to hear appeals from decisions issued by individual Hearing Examiners.

The BHA is composed of three functional divisions, all operating under the Office of the Director. The division in which the petitioned for employees are located is the Division of Field Operations. This Division is supported in logistical, fiscal, personnel, and managerial matters by the Division of Administration and is supported in policy-making and procedural matters by the Division of Program Operations. Each division has its own Assistant Bureau Director, who reports to the Bureau Director.

In the Division of Field Operations there are 7 regional offices, each headed by a Regional Hearings Representative, and within this regional office structure, there are 69 Hearing Examiner offices located throughout the United States and Puerto Rico. The total complement of Hearing Examiners currently employed by the Activity is 324. Each

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2/ The record reveals that the Association intended the proposed unit to include also individuals designated as Administrative Hearing Examiners.

Regional Hearings Representative is responsible for all offices within his region and each Hearing Examiner office is staffed with a varying number of Hearing Examiners; the "average" office consisting of 5 Hearing Examiners. One Hearing Examiner in each office is designated the Administrative Hearing Examiner. The record reveals that there is no separate position description for this title and that it is strictly an Activity designation. Administrative Hearing Examiners spend approximately 5 percent of their total time engaged in administrative matters which include approving leave, maintaining time records, requisitioning supplies, reassigning clericals, and performing other administrative duties in the office. However, in the remaining 95 percent of their time Administrative Hearing Examiners are engaged in normal hearing examiner functions with all the attendant responsibilities and duties of such a position.

The position of Hearing Examiner was created by the Administrative Procedure Act of 1946 and certain aspects of Hearing Examiners' appointments, tenure, and separation and removal procedures, differ from those accorded most Federal employees.

The basic working unit in all Hearing Examiners'offices of the Activity consists of a Hearing Examiner and at least two support personnel, a Hearing Assistant and one or two secretaries. The Hearing Examiners, who are all GS-15's,are charged with conducting hearings and rendering decisions in accordance with the applicable provisions of the law and regulations, and appropriate precedents. They are responsible also for any necessary ancillary activities connected with the hearing. The prime consideration in each hearing is to protect the interests of the Government while insuring to each claimant a fair hearing and full observance of his rights. The Hearing Assistant, who may be a GS-6, 7 or 8, prepares cases for hearing by the Hearing Examiner by obtaining all relevant documents and information and compiling such matters for use by the Hearing Examiner. Prior to the hearing, the Hearing Assistant may hold a conference with the parties to familiarize the claimant with the issues and proper procedure. During the hearing, the Hearing Assistant makes a recording of the entire proceeding. Post-hearing activities by the Hearing Assistant include preparing correspondence to the parties concerned, and performing other related duties necessary to close the case under established guidelines or in accordance with specific directions of the Hearing Examiner. The secretary to each Hearing Examiner may be a GS-4, 5 or 6. The main duties of an employee in this position include typing decisions and correspondence, taking dictation, maintaining files, and performing various other

normal secretarial duties under the direction of the Hearing Examiner. Also, on occasion, secretaries may be required to substitute for the Hearing Assistant.

While the BHA Handbook provides guidelines for handling problems encountered by staff personnel, the direct responsibility for production in each working unit lies solely with the Hearing Examiner in charge of the unit. In this regard, the record reveals that Hearing Examiners exercise their discretion in different ways in assigning work to their respective staffs and in providing their subordinates with direction and instruction.

The evidence establishes that the Hearing Examiners effectively participate in hiring, evaluating, promoting and rewarding their unit employees. In this connection, when a Hearing Assistant or secretarial vacancy occurs in a Hearing Examiner's unit, the Hearing Examiner interviews candidates for the vacant position and submits recommendations through the Administrative Hearing Examiner to the Regional Hearings Representative. The record shows these recommendations normally are followed and that Hearing Examiners have, in fact, effectively vetoed the employment of certain job candidates.

With respect to employee evaluation, Hearing Examiners are responsible for preparing an annual "employee appraisal" on each employee in their units in order to ascertain job performance and promotion potential. For either a very high or a very low rating, such evaluations require supporting comments. While these evaluations must be endorsed by the Administrative Hearing Examiner and are subject to higher levels of review, the record reflects that all Hearing Examiner evaluations generally are accepted without alteration. Further, new employees in the units must serve a probationary period and Hearing Examiners make evaluations to determine whether these probationary employees should be retained. Hearing Examiners also function as the certifying agents for acceptable level of competency determinations concerning within-grade increases for employees in their respective units. Without this certification, an employee would not receive his scheduled within-grade increases.

As to promotions, the record demonstrates that Hearing Examiners are a significant force in obtaining promotions for the support personnel in their units. Thus, the record reveals that promotion recommendations submitted by Hearing Examiners, in conjunction with their employee appraisals, constitute the major factors in promotions. Moreover, although promotion recommendations are subject to review by the Administrative Hearing Examiner and the Regional Hearings Representative, the record reflects that the Hearing Examiner's recommendations normally are accepted and affirmatively acted upon.

The record reveals also that Hearing Examiners are the initiating authority for awards. In this regard, they nominate support personnel for quality increases and cash awards and, while an Award Board makes the final determination, once the nomination has been submitted by a Hearing Examiner, the evidence establishes that it rarely is denied.

In these circumstances and noting particulary that Hearing Examiners assign and direct the work of two or more employees in their units; that they prepare performance evaluations and other evaluative reports concerning their employees; and that they effectively recommend such personnel actions as hiring, promoting, and the granting of awards, I find that the Hearing Examiners are supervisors within the meaning of Section 2(c) of the Executive Order. 3/ Accordingly, I find that the claimed unit is inappropriate for the purpose of exclusive recognition. Further, in view of my determination that the Hearing Examiners are supervisors 4/ as defined by Section 2(c) of the Order and based on the fact that the Association consists solely of such individuals, I find that the Association does not qualify as a labor organization within the meaning of Section 2(e)(1) of the Executive Order and could not be accorded exclusive recognition. 5/

Based on the foregoing, I shall order that the petition herein be dismissed.

3/ In determining that Hearing Examiners are supervisors, I note also as relevant the fact that the regional offices and Hearing Examiner offices are separated geographically and that if the Hearing Examiners and, as contended by the Association, Administrative Hearing Examiners, are not supervisors it would appear that the only supervisor in each region for Hearing Examiner offices personnel would be the Regional Hearings Representative. This would result in an average ratio of 1 supervisor to each 88 support staff employees.

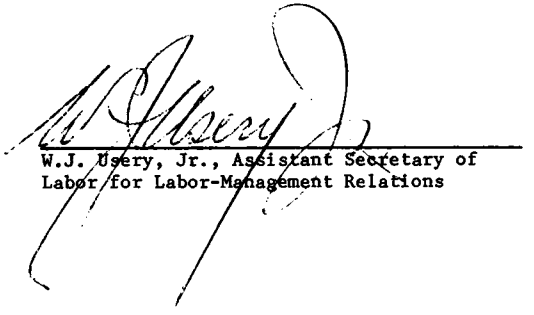
4/ My findings herein also are applicable to the individuals designated as Administrative Hearing Examiners.

5/ Although the Association is not a "labor organization" within the meaning of the Order and, thus, cannot be granted exclusive recognition, it should be noted that Sections 7 and 21(b) of the Order grant supervisors or associations of supervisors certain status and certain rights and privileges in dealing with agencies.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 22-2637 be, and it hereby is, dismissed.

Dated, Washington, D.C.
March 21, 1972



W.J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

March 21, 1972

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

U. S. DEPARTMENT OF THE INTERIOR,
PACIFIC COAST REGION,
GEOLOGICAL SURVEY CENTER,
MENLO PARK, CALIFORNIA
A/SLMR No. 143

This case arose as a result of the National Federation of Federal Employees, Local 1549 (Ind), (NFFE), filing objections alleging that certain conduct by the Activity affected the results of the election held at the Geological Survey Center, Menlo Park, California.

A hearing involving three of the objections originally filed was held before a Hearing Examiner. The objections alleged that it was improper for the Activity to announce to employees that it was permitting a labor organization (the American Federation of Government Employees, AFL-CIO, Lodge 2120), which had failed to qualify as a petitioner or intervenor, to use its facilities on an equal footing with the NFFE, and for the Activity to grant the AFGE access to its facilities to carry on a vote "no" campaign in the midst of the NFFE's election campaign.

Upon review of the Hearing Examiner's Report and Recommendations and the entire record, the Assistant Secretary found, in agreement with the Hearing Examiner, that by announcing to employees that it was permitting a non-intervening labor organization (AFGE) to use its facilities on an equal footing with the NFFE and, in fact, granting the AFGE access to its facilities and permission to post election propaganda, the Activity interfered with the employees' freedom of choice to select an exclusive representative and that such interference affected the results of the election. The Activity's contention that because the AFGE had formal recognition status, it was permitting the AFGE to do only what it had a right to do was rejected. In this regard, the Secretary noted that no matter what status the AFGE previously enjoyed, after the petition had been filed by the NFFE, and the AFGE had chosen not to intervene in the proceedings, the NFFE and the AFGE were no longer in an equal status. In these circumstances, the Assistant Secretary concluded that the AFGE should not have been permitted to conduct a membership campaign on Activity premises and to use Activity's facilities to post vote "no" propaganda.

Accordingly, the Assistant Secretary set aside the January 27, 1971 election and directed that a second election be conducted.

A/SLMR No. 143

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. DEPARTMENT OF THE INTERIOR,
PACIFIC COAST REGION,
GEOLOGICAL SURVEY CENTER,
MENLO PARK, CALIFORNIA

Activity

and Case No. 70-1829(RO)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 1549 (IND)
MENLO PARK, CALIFORNIA

Petitioner

DECISION ON OBJECTIONS
AND
DIRECTION OF SECOND ELECTION

On December 6, 1971, Hearing Examiner Henry L. Segal issued his Report and Recommendations in the above-entitled proceeding 1/, finding that the Activity engaged in improper conduct which constituted interference with the employees' freedom of choice to select an exclusive representative and affected the results of the election. Accordingly, he recommended that the election held on January 27, 1971, be set aside and a new election be directed.

The Assistant Secretary has reviewed the rulings of the Hearing Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Hearing Examiner's Report and Recommendations and the entire record, including the parties' briefs 2/, I adopt the findings and recommendations of the Hearing Examiner, except as modified herein.

1/ As noted in footnote 1 of the Hearing Examiner's Report and Recommendations, the American Federation of Government Employees, AFL-CIO, Lodge 2120, herein called AFGE, was permitted to participate in the hearing because of its involvement in this matter.

2/ Both the National Federation of Federal Employees, Local 1549 (Ind), herein called NFFE, and the AFGE filed post-hearing briefs.

As discussed in detail in the Hearing Examiner's Report and Recommendations, the objections to the election involved herein filed by the NFFE stem from the Activity's permitting the AFGE to engage in a membership campaign on its premises.

Specifically, Objections 1 and 2 alleged that although the AFGE did not acquire intervenor status in the election petitioned for by the NFFE, it was granted permission by the Activity to conduct a membership campaign, including the distribution and posting of propaganda, during the five-week period prior to election. The NFFE contended that such conduct by the Activity was in contravention of Executive Order 11491 and the Assistant Secretary's Regulations. The Activity, in attempting to justify its conduct in this regard, contended that on the basis of the AFGE's formal recognition status at the facility involved herein, the granting of permission to the AFGE merely confirmed a legal right which the AFGE already possessed. In rejecting the Activity's contention, the Hearing Examiner reasoned that while any labor organization is free to solicit membership on its own under proper conditions, an Activity may not assist a labor organization in so doing in the face of a rival petition where the organization involved has failed to qualify for intervention in that petition within the time specified by the Assistant Secretary's Regulations 3/. In these circumstances, he concluded that it was improper for the Activity to announce to employees that it was permitting the AFGE to use its facilities on an equal footing with the NFFE and for the Activity to permit the AFGE access to its facilities to carry on a vote "no" campaign. Accordingly, the Hearing Examiner recommended that Objections 1 and 2 be sustained.

Section 19(a)(3) of the Executive Order states, in part, that agency management shall not sponsor, control, or otherwise assist a labor organization, except in circumstances where it may desire to furnish customary and routine services and facilities under Section 23 of the Order 4/ when

3/ Section 202.5(c) of the Regulations provides, in part, that no labor organization may participate to any extent in any representation proceeding unless it has notified the Area Administrator of its desire to intervene within 10 days after the initial date of posting of the notice of petition.

4/ Section 23 provides that, "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; procedures with respect to recognition of labor organizations, determination of appropriate units, consultation and negotiation with labor organizations, approval of agreements, mediation, and impasse resolution; policies with respect to the use of agency facilities by labor organizations; and policies and practices regarding consultation with other organizations and associations and individual employees. Insofar as practicable, agencies shall consult with representatives of labor organizations in the formulation of these policies and regulations, other than those for the implementation of section 7(e) of this Order."

consistent with the best interests of the agency, its employees and the organization. Section 19(a)(3) provides further, however, that the furnishing of customary and routine services and facilities must be effected "on an impartial basis to organizations having equivalent status" (emphasis added). Although the subject case does not involve an unfair labor practice situation, in my view, the above-noted policy set forth in Section 19(a)(3) indicates clearly the intent of the Executive Order when at issue is a question concerning agency treatment of competing labor organizations. The underscored language set forth above establishes a general policy of permitting equal treatment by agencies to those labor organizations having equivalent status. On the other hand, where as in the subject case, labor organizations do not enjoy equivalent status, equivalent treatment may be improper.

In the instant case, when the NFFE filed a petition raising a valid question concerning representation and the AFGE, although notified of such petition, chose not to intervene in the proceedings, these two labor organizations could not be considered to have equivalent status. Thus, the NFFE was to be on the ballot and the AFGE was not. In my view, at such a point in the proceedings and irrespective of any type of recognized status the AFGE previously enjoyed, the AFGE was not entitled to equivalent treatment by the Activity with respect to electioneering privileges enjoyed by the NFFE.

In these circumstances, I agree with the Hearing Examiner's finding that by announcing to employees that it was permitting the AFGE to use its facilities on an equal footing with the NFFE and, in fact, granting the AFGE access to its facilities to carry on a vote "no" campaign, the Activity interfered with the employees' freedom of choice to select an exclusive representative and that such interference affected the results of the election. Accordingly, I adopt the Hearing Examiner's findings with respect to Objections 1 and 2 and shall direct that the election be set aside and a second election directed.

In Objection 5, the NFFE alleged that the AFGE improperly was permitted to distribute electioneering material through the Activity's internal mail system, and to post such materials on the Activity's bulletin boards. It was alleged further that the Activity improperly approved the AFGE's use of the internal mail system by a memorandum to employees dated December 23, 1970. This latter conduct allegedly constituted disparate treatment of the two labor organizations involved.

I agree with the Hearing Examiner's finding that the first portion of this Objection concerning the permission granted the AFGE by the Activity to distribute electioneering material through the internal mail system and its granting of permission to the AFGE to post such materials, was merely an extension of the previously sustained allegations in Objections 1 and 2 discussed above 5/.

5/ In view of my decision herein to set aside the election, I find it unnecessary to rule on the second portion of Objection 5 concerning alleged disparate treatment by the Activity.

Based on the foregoing, the election conducted on January 27, 1971, involving the professional and nonprofessional employees employed at the Activity is hereby set aside and a second election will be conducted as directed below.

DIRECTION OF SECOND ELECTION

IT IS HEREBY DIRECTED that a second election be conducted as early as possible, but not later than 45 days from the date below, under the supervision of the appropriate Area Administrator in the unit set forth in the Election Agreement dated December 28, 1970. 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, 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. In conformance with the requirements of the Executive Order, in addition to those not eligible to vote as set forth under paragraph 2 of the Election Agreement, are any employees employed as management officials and supervisors and guards as defined in the Order.

Dated, Washington, D. C.
March 21, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

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

U. S. DEPARTMENT OF THE INTERIOR
PACIFIC COAST REGION
GEOLOGICAL SURVEY CENTER
MENLO PARK, CALIFORNIA

Activity

CASE NO. 70-1829 (RO)

and

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1549 (Ind.)
MENLO PARK, CALIFORNIA

Petitioner

E. Kendall Clarke, Field Solicitor,
U.S. Department of Interior,
450 Golden Gate Avenue, Box 36064,
San Francisco, California 94102,
for the Activity
Homer R. Hoisington, Regional Business
Agent, National Federation of Federal
Employees, P.O. Box 870, Rialto,
California 92376, for the Petitioner
Robert Appleton, National Representative,
American Federation of Government
Employees, AFL-CIO, Lodge 2120
2057 West Mendocino, Stockton, California,
for the American Federation of Government
Employees, AFL-CIO

Before: Henry L. Segal, Hearing Examiner

REPORT AND RECOMMENDATIONS
ON OBJECTIONS TO ELECTION

Statement of the Case

This proceeding was heard under Executive Order 11491 at San Francisco, California, on September 23, 1971, in accordance with a Notice of Hearing on Objections issued on August 27, 1971, by the Regional Administrator of the United States Department of Labor, Labor-Management Services Administration, San Francisco Region, pursuant to Section 202.20(d) of the Regulations of the Assistant Secretary of Labor for Labor-Management Relations (herein called the Assistant Secretary).

The issues heard concern certain objections filed by the Petitioner (herein called the Petitioner or NFFE) to an election held among a unit of employees of the Activity on January 27, 1971, in which the Petitioner did not receive a majority of the votes cast. All parties were represented at the hearing by counsel or other representatives, who were given full opportunity to adduce evidence, examine and cross-examine witnesses, submit arguments and file briefs. 1/

Upon the entire record in this matter, from observation of the witnesses, and after due consideration of the briefs filed by the Activity, the Petitioner and the American Federation of Government Employees, AFL-CIO (herein called the AFGE), the Hearing Examiner makes the following:

Findings and Conclusions

I. The Election

Pursuant to an Agreement for Consent or Directed Election, dated December 28, 1970, a secret ballot election was conducted on January 27, 1971, in accordance with the provisions of Executive

1/ The American Federation of Government Employees Lodge 2120 was served with the notice of hearing and permitted to participate in the hearing because of its involvement with respect to the content of the objections. This procedure was directed by the Assistant Secretary as will be discussed further below.

Order 11491 (herein called the Order) in the following unit of the Activity's employees:

> "All full-time non-supervisory Geological Survey employees of the Geological Survey, Pacific Coast Center, Menlo Park, Calif. whose appointments are for more than 90 days."

Inasmuch as the unit included professional employees, the professional employees were provided with self-determination ballots in accordance with the requirements of Section 10(b)(4) of the Order.

The results of the election were as follows:

PROFESSIONAL EMPLOYEES

1.	Approximate number of eligible voters	359
2.	Void ballots	1
3.	Votes cast for inclusion in the non-professional unit	30
4.	Votes case for a separate professional unit	240
5.	Valid votes counted (sum of 3 and 4)	270
6.	Challenged ballots	none
7.	Valid votes counted plus challenged ballots (sum of 5 and 6)	270

Challenged ballots were not sufficient in number to affect the results of the election, and a majority of the valid votes counted plus challenged ballots were not cast for inclusion in the non-professional unit.

VOTES FOR SEPARATE UNIT

1.	Void ballots	1
2.	Votes cast for NFFE	38
3.	Votes cast against exclusive recognition	232
4.	Valid votes counted	270
5.	Valid votes counted plus challenged ballots	270

Challenged ballots were not sufficient in number to affect the results of the election and a majority of the valid votes counted plus challenged ballots were not cast for the NFFE.

II. The Objections Noted for Hearing

Timely objections to conduct affecting the results of the election were filed on February 3, 1971, by the Petitioner, nine in number. Pursuant to Section 202.20 of the Assistant Secretary's Regulations, after investigation by the Area Administrator, the Regional Administrator issued his Report and Finding on the Objections on May 7, 1971. He found merit to three of the nine objections, Objections Nos. 1, 2 and 5, and ruled that the election should be set aside and rerun at an early date. Thereupon the Activity filed a request for review of the Regional Administrator's findings with the Assistant Secretary pursuant to Section 202.20(f) of the Regulations. On August 6, 1971, the Assistant Secretary granted the Activity's request for review in which the Activity sought a hearing on Objections 1, 2 and 5, and directed the Regional Administrator to issue a notice of hearing. The Assistant Secretary also stated in his letter granting the request for review: "American Federation of Government Employees Lodge 2120, because its activities are alleged to have improperly affected the election, shall be served with notice and permitted to participate in the hearing." The notice of hearing was then issued in due course by the Regional Administrator as previously noted herein.

The text of the objections noted for hearing by the Assistant Secretary follows:

"1. On approximately November 24, 1970, the official notice to employees was posted, informing them of the NFFE petition for an election. Following the 10 day posting period, during which time no Intervenor qualified for the ballot, the activity approved a membership campaign for the American Federation of Government Employees (AFGE). This campaign was announced to all employees on December 23, 1970, and has continued to the present (Exhibit #1). The approval for a membership campaign actually permitted the AFGE to participate in the representation proceedings through their distribution and posting of electioneering materials for a 5 week period prior to the election." 2/

"2. The granting of approval for a membership campaign to a non-intervenor competitor, following the expiration of the posting period is believed to be completely inappropriate and is in contravention to the spirit and intent of Executive Order 11491 and the regulations of the Department of Labor."

"5. The AFGE was permitted to distribute electioneering material through the internal mail system, and to post such materials on bulletin boards (Exhibits #4 and#5). The use of the internal mail system to distribute "Promotional material" was approved by Mr. Kelley in his Memo of December 23rd (Ex #1), but these two samples can hardly be classified as promotional materials, used in connection with a supposed membership campaign. As far as the distribution of materials by the NFFE was concerned, this was accomplished by NFFE members on annual leave. Distribution of the AFGE material, in some cases was accomplished by government employees on official time." 3/

2/ The Exhibit #1 referred to in the objection will be discussed below.

3/ The Exhibits # 4 and#5 referred to in the objection will be discussed below.

A. The Background Facts

(1) The Activity

The Pacific Coast Region located at Menlo Park, California, is part of the Geological Survey, a scientific agency of the U. S. Department of the Interior, and exists to facilitate the work of the Geological Survey in the Western States. The work of the Survey is divided among four operating divisions: Topographic; Geologic; Water Resources; and Conservation; and three staff divisions - Computer Center, Publications, and Administration. The Pacific Coast Region operates out of some ten buildings located in its complex at Menlo Park.

(2) The Status of Lodge 2120, American Federation of Government Employees, AFL-CIO

On October 1, 1962, Lodge 2120, AFGE, was granted formal recognition for the employees at the Activity under the provisions of Executive Order 10988. (Executive Order 10988 was succeeded by the present Executive Order 11491.) Formal recognition under Executive Order 10988 required that the Agency consult with the labor organization from time to time in the formulation and implementation of personnel policies and practices, and matters affecting working conditions that were of concern to the Organization's members. The labor organization was entitled from time to time to raise such matters for discussion with appropriate officials and at all times to present its views thereon in writing. However, formal recognition did not entitle the labor organization to negotiate agreements. The succeeding Executive Order 11491 at Section 8 provides for the discontinuance of the accord of formal recognition after January 1, 1970, and for the termination of previously accorded formal recognitions under regulations prescribed by the Federal Labor Relations Council. Under regulations issued by the Federal Labor Relations Council (2412.7A2), formal recognitions were terminated as of July 1, 1971.

Turning to the instant representation matter, subsequent to the filing of the petition for exclusive representation by the Petitioner notices of the petition were posted by the Activity in accord with Section 202.4(b)(c) and (d) of the Assistant Secretary's regulations, and the ten-day posting period expired on or about

November 24, 1970. The AFGE did not properly intervene in the proceeding and consequently was not a party to the consent-election agreement and was not afforded a place on the ballot.

B. The Facts as to the Objections

Inasmuch as many of the facts are material to all three objections noted for hearing, they will be discussed as a group.

(1) Permission to Conduct Campaign Granted Petitioner

By prearrangement, James Piper, an employee of the Activity and president of the local of the NFFE involved, and Homer Hoisington, National Representative of the NFFE, met with DeWitt M. Kelley and Donald Parks, Personnel Officer and Assistant Personnel Officer, respectively, of the Activity on September 8, 1970. There a letter from Hoisington, dated September 7, 1970, addressed to Kelley was delivered. This letter requested permission to conduct an organization campaign among the employees of the Activity on behalf of NFFE. The pertinent paragraph in the letter which sought cooperation of the Activity reads:

> "Permission is requested to place, and hand out literature to employees at building entrances and in the cafeterias or lunchrooms in your various offices, and that space on your bulletin boards be provided for the posting of meeting notices, flyers, and other promotional materials. In some instances a suitable meeting place for meetings of employees during non-duty hours may be requested."

The letter also requested a listing of all the employees of all the employees of the Activity, showing their names, series, grade and duty location by organizational assignment.

At the meeting of September 8, 1970, the discussion involved the prospective campaign and the extent of cooperation by the Activity. Hoisington presented to Kelley a sample letter sent by a facility of the Department of the Defense in August 1970, to its employees announcing a campaign to be conducted among its employees by the NFFE. Hoisington requested that the Activity issue a similar letter.

As a consequence of that September 8th meeting, on September 14, 1970, the Activity transmitted to NFFE local president Piper a list of personnel showing names, series, grade, and duty location, by organizational component, and on October 5, 1970, issued a memorandum signed by Personnel Officer Kelley to "All Geological Survey Employees, Pacific Coast Center," subject NFFE Membership Drive. (A copy of this memorandum is attached as "Appendix 1.") The memorandum in general advises the employees of the membership drive, asserts the impartial position of the Activity, and notes for the employees that, "The decision to join or not to join any union or any organization is a matter for individual decision by each employee. There may be no coercion for or against joining either by the union or by management." Further, the memorandum notes that union representatives may contact employees in their office, laboratory, or other location during lunch or coffee breaks or possibly before or after work, but that membership recruitment during duty hours is prohibited.

(2) Permission Granted to AFGE to Conduct Campaign

On December 23, 1970, the Activity issued another memorandum to, "All Geological Survey Employees, Pacific Coast Region," subject: "AFGE Membership Drive." (A copy of this memorandum is attached as "Appendix 2." 4/) This memorandum announced the permission granted also by the Activity to the AFGE at the AFGE's request to conduct a membership drive. Of basic significance to the objections is that the December 23, 1970 memorandum issued after AFGE had failed to intervene in connection with NFFE's petition for exclusive recognition during the period specified by the Assistant Secretary's Regulations. Further, the December 23, 1970 memorandum concerning the AFGE's membership drive differs from the October 5, 1970 memorandum concerning the NFFE's membership drive in two respects. In the third paragraph which deals in both memoranda with the permitted activity of union representatives, the December 23, 1970 memorandum includes two sentences not included in the October 5, 1970 memorandum, as follows: "It [promotional material] also may be mailed directly to employees through Survey channels." "The union [AFGE] has also been granted permission to set up a small table outside the snack bar in Building I."

4/ This memorandum was attached to NFFE's Objections as Exhibit #1.

(3) Explanation of Differences in Memoranda

It is necessary at this point for an understanding of the Activity's explanation for the differences in the memoranda to describe the various Survey channels for distribution of material. Located in an addition to Building I of the Activity is a mail room. The first Survey channel of distribution described in the record is for bulk material to be broken down in the mail room by mail room employees for delivery of sufficient copies to each administrative segment for distribution to the employees. This method, according to the Activity, is reserved for official distribution of government materials. A second Survey channel is for material to be mailed to individual employees at the Activity through the United States mails, care of the Activity, and the mail is then delivered to the addressees. A third possible Survey channel is for delivery direct to the mail room of material enclosed in individual envelopes addressed to each employee at his duty location, and the envelopes would be distributed. A fourth Survey channel consists of individual "pigeon holes" located in the mail room for approximately 30 percent of the employees, mainly professional and higher ranking personnel. Material can be stuffed in the pigeon holes for distribution.

At the September 8, 1970 meeting between the Activity and the NFFE, the Activity offered the NFFE the use of all or either of the Survey channels described above except the first channel of delivering bulk material to the mail room for delivery. The NFFE evinced reservations to the use of the Survey channels offered because of the great expense and effort of individually addressing envelopes even if the envelopes were delivered direct to the mail room avoiding the necessity of postage stamps. It also felt that the "pigeon hole" method would only reach a fraction of the employees. According to the Activity, the AFGE was offered the same Survey channels as was offered to the NFFE, and the AFGE evinced an interest in using them. The AFGE also requested a table for organization purposes and the NFFE did not. Accordingly, the Activity inserted the two sentences in the December 23, 1970 memorandum which were not contained in the October 5, 1970 memorandum.

(4) Pro-AFGE and Anti-NFFE Material

James Morley, President of Local 2120, AFGE (the local which had formal recognition at the Activity) testified that the AFGE did not conduct much of a membership campaign as such at the Activity in

the period preceding the election. However, a few days before the election, a supply of handbills which were prepared by Robert Appleton, National Representative of the AFGE, was delivered to the Activity. (A copy of this handbill is attached as "Appendix 3.") Copies of this handbill seeking a "No" vote to gain time for the AFGE were posted on various bulletin boards and doors in several of the Activity's buildings. Mike Gerandakis. NFFE's Area Coordinator, discovered a bulk number of the AFGE handbills in the Activity mail room and mail room employees were stuffing the handbills in the pigeon holes and otherwise starting distribution through Survey channels. He complained to officials of the Activity, and they stopped the distribution. A Mr. Dukes who was assisting in the NFFE drive removed some of the handbills from the doors and bulletin boards and took them to officials of the Activity. Dukes was advised by Avery Rogers, Management Officer of the Activity, that Dukes had no right to remove them, that these handbills were permissable. (According to Rogers, he checked with an employee in the Department of Labor's Area Office and was advised that such handbills should not be removed from the bulletin boards.)

Gerandakis and Dukes also discovered that some of the handbills (Appendix 3) were marked up by some unknown person or persons. (A sample marked-up copy is attached hereto as "Appendix 4." 5/) Also the day before the election, a leaflet which was a corruption of a leaflet issued by the NFFE was found posted in one of the buildings. (Attached hereto as "Appendix 5." 6/) This leaflet was printed on some type of plastic material, similar to material used by the Activity. Dukes removed this leaflet as well as copies of the marked-up leaflet (Appendix 4) and brought them to the attention of the Activity on the day before the election. The Activity was not able to place the responsibility for these two leaflets (Appendices 4 and 5). However, Rogers caused them to be removed from

5/ A copy of the marked-up leaflet was attached as Exhibit #5 by the NFFE to its Objections.

6/ A copy of this leaflet was attached as Exhibit #4 by the NFFE to its Objections.

display as Management considered them to be objectionable. However, Management considered the unmarked leaflet (Appendix 3) to be permissable membership material of the AFGE and permitted it to remain posted.

In the week before the election, James Piper, President of the NFFE local, because of the discovery by the NFFE of Activity of mail room employees working on bulk distribution of AFGE material (Appendix 3) asked for permission to use Survey channels for bulk distribution of NFFE propaganda. This was denied by the Activity, which reiterated its permission given on September 8, 1970, to use the other methods available through Survey channels.

CONCLUSIONS

Objections Nos. 1 and 2

The main thrust of the Activity's arguments in justifying its conduct in granting the AFGE permission to conduct a membership drive during a time subsequent to the qualifying time for intervention in the election and the pendency of the election itself, is that the AFGE was formally recognized under the previous Executive Order 10988, and this formal recognition would not expire until July 1, 1971, under the rules of the Federal Labor Relations Council. It argues that with such formal recognition the AFGE could in fact solicit members at any time and that in granting permission for a membership drive the Activity agreed to only that which the AFGE has a legal right to do.

I agree that any labor organization, whether it has formal recognition or not, is free to solicit membership on its own under the proper conditions. But, I do not agree that an Activity may assist a labor organization in so doing in the face of a rival petition where the assisted labor organization has failed to qualify for intervention within the time specified in the Assistant Secretary's Regulations.

The Assistant Secretary has spoken to the issue of sponsorship of anti-union literature by an Activity in the context of individual employee activity. In a "Report on a Ruling of the Assistant Secretary Pursuant to Section 6 of Executive Order 11491,"

Report No. 32, June 14, 1971, "The question was raised whether an activity engaged in objectionable conduct affecting the result of an election by approving the distribution of anti-union literature by employees. The literature was not beyond proper bounds in its content and was not sponsored or endorsed by the Activity." [Emphasis supplied.] The Assistant Secretary ruled that under Section 1(a) of the Order employees have the right to express their ideas freely in an election campaign, and they may not be prohibited from distributing literature "based solely on the fact that it is unfavorable to a particular labor organization." Thus, it is clear that employees as individuals may support or refrain from supporting any labor organization,on or off the Activity's premises,with a proscription that it not be on official time so as to interfere with the operations of the agency. 7/ However, the instant case poses a different situation. There is an indication by the Assistant Secretary in Report Number 32 that anti-union literature [or literature on behalf of a labor organization] may not be sponsored or endorsed by the Activity. In substance, by its written announcement to its employees of December 23, 1970, concerning its permission granted to the AFGE to conduct a membership drive which included anti-petitioner propaganda, the Activity was endorsing AFGE's participation in the campaign, in a situation where, in my opinion, the AFGE had no standing to merit the assistance of the Activity.

The scheme of the Assistant Secretary's Regulations in achieving the objectives of the Order is that a labor organization (other than the petitioner) may not participate to any extent in a representation proceeding unless it qualifies as an intervenor within the prescribed time. 8/ Here the AFGE did not qualify as an intervenor and had no place on the ballot. Notwithstanding that the AFGE had formal recognition under the previous Executive Order 10988, it lost its standing to participate in this representation proceeding. Yet, the Activity gave the AFGE the same standing to use its facilities as the Petitioner and so advised its employees. This would tend to disrupt the election processes which are basic to the Order. It could only lend confusion in the minds of the employees. A study

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7/ See Charleston Naval Shipyard, A/SLMR No. 1; California Army National Guard, A/SLMR No. 47.

8/ See Sec. 202.5(c) of the Assistant Secretary's Regulations.

of the AFGE's handbill (Appendix 3) 9/ which the Activity considered to be permissible membership propaganda proper for distribution and posting at its premises, reveals that the AFGE was urging, with the Activity's condonation, that the employees vote "no" to the NFFE to give AFGE the time to present a program for the employees' approval. One of the significant defects in such propaganda, is that the employees are being requested to forego labor organization representation for at least one year, since the Regulations provide that a petition would be untimely for a unit where a valid election was held within the preceding twelve (12) month period. (See Sec. 202.3(a) of the Regulations.) The AFGE could not give the employees the type of current representation afforded by an exclusive representative, and its formal recognition would expire by July 1, 1971.

For the above reasons, I find that it was improper for the Activity to announce to employees that it was permitting a labor organization which failed to qualify as a petitioner or intervenor to use its facilities on an equal footing with the Petitioner and for the Activity to permit the unqualified labor organization access to its facilities to carry on a vote "no" campaign in the midst of the NFFE's election campaign. I further find that this impropriety constituted interference with the employees' free choice of ballot to select an exclusive representative, and that such interference affected the results of the election. Accordingly, I conclude that Objections Nos. 1 and 2 are meritorious and should be sustained.

9/ I do not assess any liability to the Activity for the other material posted (Appendices 4 and 5). There is no evidence placing responsibility for the material, and the Activity took steps to remove it when called to its attention.

The AFGE admitted responsibility for Appendix "3." However, it urges that the NFFE, in attaching as exhibits to its objections what is included herein as Appendices "4" and "5," was dishonest in that it implied that AFGE was responsible for Appendix "4," the marked-up version of Appendix "3," and Appendix "5," the corrupted version of an NFFE handbill. The AFGE argues in its brief that the NFFE should be ordered to apologize publicly. That the NFFE attached specific items to its objections which were not proven to be the work of the AFGE does not affect the validity of the objections, and I do not believe that it is within my mandate to recommend that one labor organization be required to publicly apologize to another.

Objection No. 5

Objection No. 5 in substance has two prongs. First it alleges that the Activity permitted the AFGE to distribute electioneering material through the internal mail system, and to post such materials on the bulletin board. This allegation is merely an extension of the allegations in Objections 1 and 2 and have been considered in my discussion above of Objections Nos. 1 and 2. Insofar as AFGE used the Survey mail system, it was permitted to do so on the same basis as was offered to the NFFE. Where it was called to the attention of the Activity that the AFGE was attempting to use Activity mail room employees to distribute its propaganda, the Activity stopped it. Accordingly, the above-discussed portions of Objection No. 5 adds nothing not covered in Objections 1 and 2. Second, Objection No. 5 alleges that the Activity's memorandum to employees of December 23, 1970 (Appendix 2) announcing the AFGE campaign contained an approval of the AFGE's use of the internal mail system. This portion of the objection appears to go to an announcement of disparate treatment of the two labor organizations. As I have previously concluded, the assistance to the AFGE by the Activity was improper. However, this improper memorandum contains statements of Activity approved modes of communication with its employees not contained in the memorandum of October 5, 1970, announcing the NFFE's membership campaign (Appendix 1). The Activity's explanation for the sentence in the December 23, 1970 memorandum, "It [promotional material] also may be mailed direct to employees through Survey channels," was that this referred to the delivery of material to the mail room in individual envelopes each addressed to the employee recipient. The Activity testified that this method was offered to the NFFE and the NFFE representatives evinced no interest in using it, and the AFGE did evince an interest in using this method. Further, the Activity explained that unlike the October 5, 1970 memorandum referring to the NFFE campaign, the December 23, 1970 memorandum granted permission to the AFGE to set up a small table outside the snack bar in Building I because the AFGE requested such permission and the NFFE did not.

The Activity's explanations for the additional privileges to the AFGE announced in its memorandum to the employees have some validity. But, the impact on the Activity's employees must be considered. Thus, not only did the Activity issue a memorandum which was objectionable, but it tended to implant (even assuming it was unintentional) in the minds of the employees that the Activity

favored the AFGE over the NFFE by granting it privileges not accorded the NFFE. Therefore, I conclude that the announcement to its employees by the Activity in its December 23, 1970 memorandum of availability to the AFGE of Activity facilities, not announced to its employees in the October 5, 1970 memorandum as available to the NFFE, further interfered with the free choice of its employees to select an exclusive representative, and that the portion of Objection No. 5 going to this matter be sustained.

RECOMMENDATIONS

In view of my conclusions above that Objections Nos. 1 and 2 and a portion of Objection No. 5 are meritorious, it is recommended that the Assistant Secretary sustain these objections. Further, it is recommended that the Assistant Secretary set aside the election conducted on January 27, 1971, and that he direct that a second election be conducted under the terms of Executive Order 11491, and in accordance with the applicable Regulations.

Henry L. Segal

HENRY L. SEGAL
HEARING EXAMINER

Dated at Washington, D. C.
DECEMBER 6, 1971

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

ARMY AND AIR FORCE EXCHANGE SERVICE,
KEESLER CONSOLIDATED EXCHANGE
A/SLMR No. 144

This proceeding arose upon the filing of two unfair labor practice complaints. The first was initiated by Local 2670, American Federation of Government Employees, AFL-CIO (Union), in which a Section 19(a)(6) violation of Executive Order 11491 was alleged based on the Exchange's (1) dilatory tactics in delaying the start of negotiations; (2) failure to empower its principal negotiator with authority to conclude an agreement; (3) failure to offer meaningful proposals on certain subjects of negotiation; (4) unilateral change in conditions of employment; (5) reliance on certain "unlawful" Army and Air Force Exchange Service (AAFES) personnel regulations; and (6) "closed mind" at the bargaining table as evidenced by its overall method of negotiating. The second complaint, initiated by the Exchange, alleged violation of Sections 19(b)(1) and (6) because of the Union's (1) failure to empower its principal negotiator and negotiating committee with authority to conclude an agreement; and (2) attitude of hostile contempt for the Executive Order and pertinent AAFES directives and regulations.

Following a consolidated hearing, the Hearing Examiner issued a Report and Recommendations dismissing both complaints in their entirety.

Upon consideration of the Hearing Examiner's Report and Recommendations and the entire record in the subject cases, including exceptions filed by the Exchange, the Assistant Secretary adopted the dismissal recommendations of the Hearing Examiner with certain modifications.

With respect to the action brought by the Union against the Exchange, the Assistant Secretary concluded that:

(1) The Exchange-caused delay of four months in the start of negotiations, standing alone, ordinarily would constitute a refusal to consult, confer, or negotiate within the meaning of Section 19(a)(6) of the Order. However, noting particularly that prior to January 1971, the Union did not press for immediate negotiations and once negotiations began they were transacted with sufficient diligence, no violation on this aspect of the complaint was found.

(2) The Exchange's negotiating method of considering the Union's proposed collective-bargaining agreement article by article, rather than submitting its own counterproposals in advance, was a legitimate bargaining approach.

(3) Although the Exchange's principal negotiator indicated, at various times during bargaining sessions, that certain Union agreement proposals could not be approved because they were contrary to AAFES regulations and the Order, and, in addition, refused Union requests to seek changes in the pertinent regulations from higher authorities, in the circumstances of this case, such conduct did not violate the Order either in terms of the Exchange negotiator's authority to bargain, or in terms of overall good faith bargaining.

(4) Finally, as to the Exchange's refusal to discuss, in whole or in part, specific agreement proposals relating to hours of work, promotion, and dues checkoff, no Section 19(a)(6) violation was found at this time because of the Union's failure to pursue procedures designated in Section 11(c) of the Executive Order. Additionally, the Assistant Secretary found that the Exchange's bargaining pertaining to the Union's arbitration proposal was in good faith.

The decision included a discussion of the implications of Section 11(c) procedures, and the respective roles of the Federal Labor Relations Council and the Assistant Secretary of Labor for Labor-Management Relations flowing therefrom.

With respect to the action brought by the Exchange against the Union, the Assistant Secretary concluded that the Hearing Examiner was correct in finding that the Union did not violate its duty to bargain under Section 19(b)(6) because the evidence did not support the contentions that the Union denied proper authority to its chief negotiator and negotiation committee members for consummating a collective-bargaining agreement. The evidence also failed to show that the Union negotiators' expressions of displeasure with certain aspects of the Executive Order and with various Exchange policies and regulations constituted Section 19(b)(6) violation.

In conclusion, the Assistant Secretary found no independent evidence of Union interference with, restraint, or coercion of employees in the exercise of rights assured by the Order.

A/SLMR No. 144

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ARMY AND AIR FORCE EXCHANGE SERVICE,
KEESLER CONSOLIDATED EXCHANGE 1/

Respondent

and

Case No. 41-1905 (CA)

LOCAL 2670, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO 2/

Complainant

LOCAL 2670, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Respondent

and

Case No. 41-2130 (CB)

ARMY AND AIR FORCE EXCHANGE SERVICE,
KEESLER CONSOLIDATED EXCHANGE

Complainant

DECISION AND ORDER

On June 9, 1971, Hearing Examiner Henry L. Segal issued his Report and Recommendations in the above-entitled proceeding, 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. Thereafter, the Army and Air Force Exchange Service, Keesler Consolidated Exchange 3/ filed exceptions with respect to the conclusions and

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

2/ The name of the Complainant appears as amended at the hearing.

3/ Herein referred to as the Exchange.

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recommendations relative to Case No. 41-2130 (CB) contained in the Hearing Examiner's Report and Recommendations. 4/

The Assistant Secretary has reviewed the rulings of the Hearing Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Hearing Examiner's Report and Recommendations and the entire record in the subject cases, including the exceptions, I hereby adopt the findings, conclusions, and recommendations of the Hearing Examiner as modified below. 5/

The complaint in Case No. 41-1905 (CA), filed by the Union against the Exchange, alleged violation of Section 19(a)(6) of Executive Order 11491 based on the Exchange's (1) dilatory tactics in delaying the start of negotiations; (2) failure to empower its principal negotiator with authority to conclude an agreement; (3) failure to offer meaningful proposals on certain subjects of negotiation; (4) unilateral change in conditions of employment; (5) reliance on certain "unlawful" Army and Air Force Exchange Service personnel regulations; and (6) "closed mind" at the bargaining table as evidenced by its overall method of negotiating. The complaint in Case No. 41-2130 (CB), filed by the Exchange against the Union, alleged violation of Sections 19(b)(1) and (6) of Executive Order 11491 based on the Union's (1) failure to empower its principal negotiator and negotiating committee with authority to conclude an agreement; and (2) attitude of hostile contempt for the Executive Order, and pertinent Army and Air Force Exchange directives and regulations. Because these allegations raise important issues as to the bargaining obligations of agencies and labor organizations under Executive Order 11491, I feel it necessary to present, at the outset, a detailed review of the pertinent facts.

4/ Local 2670, American Federation of Government Employees, AFL-CIO, herein referred to as the Union, filed no exceptions to the Hearing Examiner's Report and Recommendations.

5/ During the course of the proceeding in these cases, a new Executive Order, No. 11616, was issued on August 26, 1971, effective November 24, 1971, amending portions of Executive Order 11491. Notwithstanding that the instant cases are governed by Executive Order 11491, it should be noted that Executive Order 11491, as amended, contains no relevant revisions of any Executive Order sections applicable herein. Therefore, the following discussion and conclusions may be regarded in terms of future applicability under Executive Order 11491, as amended.

Course of Negotiations

It is undisputed that the Union was granted formal recognition by the Exchange on July 12, 1968, under Executive Order 10988. Subsequently, the Union won a representation election held on June 20, 1969, and by letter dated July 3, 1969, was granted exclusive recognition for a unit of regular full-time and part-time hourly paid civilian employees at the Exchange, with various categories of personnel excluded. 6/ In October 1969, the Union submitted a proposed agreement to the Exchange. The Exchange indicated that it would meet with the Union for negotiations in November 1969, but this did not occur allegedly because of the necessity of transmitting the Union's proposals to the Army and Air Force Exchange Service headquarters in Dallas, Texas. 7/ Thereafter, on two other occasions, the Exchange scheduled and postponed the start of negotiations. In this connection, a December 1969, date was abandoned by the Exchange based on the "busy holiday season" and a January 1970, date was cancelled due to the Exchange's annual inventory. With an indication by the Union that it would have to do something about these delays, negotiations ultimately commenced on February 10, 1970.

This first session was devoted to the establishment of ground rules which included, among other things, a procedure for handling disputes and impasses, one part of which called for submission of disputed and impassed issues to the Federal Mediation and Conciliation Service and to the Federal Service Impasses Panel; and a procedure for reaching a completed agreement, with the Exchange and Union agreeing to each proposed article separately as discussed but withholding their final approval pending completion of the total agreement. 8/ The chief negotiator for the Exchange was an assistant general counsel for labor relations from the AAFES and the Union was represented principally by the Local's president.

6/ In agreement with the Hearing Examiner, I find that the Exchange cannot now raise as a defense in this unfair labor practice proceeding the contention that the unit involved herein is inappropriate because it excludes military personnel employed during off duty hours.

7/ Herein referred to as the AAFES.

8/ While I note the nature of these "ground rules," the Hearing Examiner is correct in his comment that I am not required under the Order, nor do I think it would effectuate the policies of the Order, to interpret or police such side agreements absent evidence that they constitute independent violations of the Order. Cf., Report on a Decision of the Assistant Secretary, Report No. 20.

The parties next met on February 11, 12, 13, 16, 17, and 18; and on March 16, 17, 18, and 19. The Union's October proposals formed the basis for discussion and the Exchange offered proposals only when it found a Union version to be unsatisfactory. The Exchange's counterproposals generally were submitted at the meeting in which the subject involved was considered, rather than in advance. As a result of this negotiating process, both sides agreed to approximately 17 agreement items. However, three items remained open: arbitration, hours of work, and promotion. With respect to these subjects, a Federal mediator was requested by the Union to conduct a meeting on April 23, 1970. After conferring with each side separately, he apparently suggested that the Exchange might try to come up with new counterproposals on these subjects. But at a session held the following day, April 24, the Exchange merely presented a slightly reworded clause concerning hours of work.

Thereafter, in a letter dated June 20, 1970, the Union charged the Exchange with violating Section 19(a)(6) of the Order by sending a principal negotiator to the bargaining table who was strictly governed by orders from the AAFES, thereby lacking authority to conclude an agreement. It alleged also that the Exchange's negotiator refused to bargain on the issues of arbitration, hours of work, and promotion. The Exchange did not reply to the charge until August 21, and during the interim the Union filed its complaint herein on August 12, 1970. At the Exchange's request, a second Federal mediator was scheduled to attend, what turned out to be, a final negotiation meeting on October 2, 1970.

At the October 2 meeting, the Exchange submitted new or rewritten counterproposals on arbitration, hours of work, and promotion (a discussion of the substance of each is presented below), and the Exchange also raised, for the first time, an entirely new issue - dues checkoff. The record reveals that previously dues checkoff had not been a subject of bargaining because, as a result of the Union's formal recognition under Executive Order 10988, a written agreement providing for the withholding of union dues was executed between the parties on July 11, 1968. 9/

9/ This "Memorandum of Understanding" made eligible for checkoff authorization, "all employees of /the Exchange/, except any unit whereby exclusive recognition has been granted," and it called for termination of an allotment under various circumstances affecting the individual authorizing employee and also "at the beginning of the first pay period after the Commander, Keesler AFB, Mississippi, determines that the Lodge is no longer eligible for formal recognition." Despite the fact that, by its terms, this checkoff arrangement could have been ended when the Union gained exclusive recognition on July 3, 1969, it was not, and authorized dues withholding has continued without interruption from 1968, to the present date. Thus, as of the start of negotiations in February 1970, and until about October 2, it appears the Union assumed dues checkoff was covered by the separate Memorandum of Understanding and would not be included in any negotiated agreement.

The issue with respect to dues checkoff developed as a result of the issuance by the AAFES on May 29, 1970, of an Exchange Service Bulletin No. 58, entitled "Voluntary Deduction of Labor Organization Dues," which was applicable to all of its exchange service components. The bulletin stated that its purpose was "to provide guidance to exchanges for the voluntary deduction of labor organization dues from the pay of AAFES employees who are members of organizations which have been granted formal or exclusive recognition." It stated further that: "Where a labor organization holds or obtains exclusive recognition, the dues withholding procedures, if any, will be part of the collective bargaining agreement and will terminate concurrently therewith. All agreements are subject to and become effective on the approval of the Chief, AAFES. They may not exceed two years in duration."

On October 2, the Exchange announced at the bargaining session that, in line with the new policy, existing checkoff procedures under the side agreement would have to be discontinued and any new arrangement would have to be included in the parties' negotiated agreement. A checkoff proposal consistent with the AAFES bulletin was presented, and this proposal, along with the Exchange's counterproposals on the three open items, was submitted to the Union as a "package deal," the Union being asked to accept all as written, or reject them. Strenuously objecting to this procedure and to the introduction of a checkoff issue into the negotiations, in light of the parties' existing side agreement, the Union rejected the four "packaged" contract clauses. In so doing, the Union's chief negotiator stated it would be necessary to contact the Union's national headquarters regarding the AAFES's new dues withholding policy before the Union could consent to a different kind of checkoff arrangement.

Subsequent to October 2, 1970, the Union made no further reply to the Exchange's "package deal," nor did it request any further negotiation meetings. On or about January 20, 1971, the Exchange filed its complaint against the Union alleging violation of Sections 19(b)(1) and (6) of the Order.

Disputed Agreement Proposals

Arbitration. Early in the negotiations, the parties agreed to all but the last step of a grievance procedure. In this regard, the Union sought a provision for arbitration handled by an outside arbitrator, with costs equally divided between the parties. The Exchange, rejecting this, countered with a method whereby a hearing officer would be selected by the parties from a list of military or civilian personnel under the jurisdiction of the Installation Commander, but not Exchange employees, who would render an advisory opinion subject to final decision by the Commander. In support of its

counterproposal, the Exchange contended that (a) the Exchange had no budget provision for paying outside arbitrators, (b) Exchange profits were designated specifically for the Central Servicemen's Relief Fund, and (c) an outside arbitrator would not be as familiar with Exchange operations and regulations as would a person connected with the Air Force Base.

Because the Union rejected the Exchange's suggestion, this issue remained at impasse until the Exchange submitted its "package deal" on October 2. Included in that offer was the Union's arbitration proposal.

Hours of work. The record reveals that the Exchange currently schedules a majority of its employees to work six days a week for a total of 40 hours. Overtime is calculated on the basis of hours worked beyond the 40-hour regular workweek. The Union proposed that overtime be paid for all time exceeding 40 hours per week or eight hours per day. But, with respect to overtime, the Exchange noted that an AAFES regulation that, "Only time worked in excess of 40 hours during the administrative workweek is considered overtime work," would not permit institution of the Union's proposal. No further discussion of overtime was entertained during negotiations.

As noted above, the normal administrative workweek for a majority of the Exchange's employees is six days a week for a total of 40 hours. However, the Union contended that all Exchange employees could and should be assigned to a 5-day schedule, with two consecutive days off. 10/ This also was dismissed by the Exchange on the basis of the following AAFES regulation: "The regular scheduled workweek will not exceed 40 hours. Except where inconsistent with operational needs, the hours scheduled will not exceed 8 hours per workday and will not be scheduled for more than 5 days in an administrative workweek. The regular scheduled workweek will not include hours on more than 6 days or include more than 10 hours on any one workday, except during an annual or other directed inventory." The Exchange contended its "operational needs" demand that its facilities be open at least six and, in some cases, seven days a week, thereby rendering the 5-day workweek virtually impossible with its present employee complement. With continued Union insistence to the contrary, the Exchange, in connection with a feasibility survey, asked facility managers to write out tentative 5-day schedules for their employees. 11/ Overall, the Exchange's survey apparently

10/ The evidence reveals that for many years a few employees assigned to one Exchange outlet, the "Quick Shop," had a 40-hour, 5-day workweek.

11/ The "Quick Shop" manager apparently misunderstood that this was to be on paper only, and, in fact, instituted the new workweek for all "Quick Shop" employees. The Exchange reported this change to the Union at the next negotiation session and offered to reinstate the prior "Quick Shop" schedule. The Union, while objecting to the unilateral action, conceded it would be unnecessary to return to the prior schedule.

indicated that a 5-day workweek would require more regular part-time employees and, hence, some current full-time employees would have to work on a regular part-time basis. Because this would result in a loss of pay to the affected employees, the Union rejected this Exchange solution.

The parties thereafter remained deadlocked on both aspects of hours of work, with the Exchange alleging ultimately that the subjects of overtime and workweek scheduling were nonnegotiable under Section 11(b) of the Executive Order.

Promotion. Various aspects of promotion policy were discussed during negotiations and agreement was obtained on some matters, such as job posting. However, impasse was reached on two issues - promotional criteria and their procedural use. First, the Union sought to implement criteria for promotion through the assignment of a specific numerical weight to each. Second, the Union objected to the use of "veteran status" as a criterion because it discriminates against women. Both of these subjects are referred to in an AAFES regulation which provides that: "Employees are selected for promotion on the basis of performance, potential, length of AAFES service and veteran status, in that order of importance." In this connection, the Exchange objected to bargaining about either of the foregoing subjects, contending that the cited regulation was controlling and unalterable, and that, moreover, these aspects of promotion policy are not negotiable because of Sections 11(a), and 12(a) and (b)(2) of the Executive Order.

Notwithstanding the Exchange's position in this regard, at the parties' October 2 meeting it offered, as part of the "package," an agreement provision which stated that, "Employees are selected for promotion on the basis of performance, potential, length of service and veteran status in that order of importance. Where performance, potential and length of AAFES service are equal, veteran status will be used only to break a tie. Performance evaluations will be made by Branch Managers." When this particular concession as to "veteran status" was made, the Exchange's chief negotiator allegedly remarked that in doing this he might be exceeding his authority.

With regard to all disputed agreement proposals, the record indicates that whenever the parties' difficulties centered on a particular AAFES regulation, the Union frequently asked the Exchange to seek rulings and/or changes in the regulations through its headquarters. The Exchange refused, pointing out that it was the Union's obligation to challenge regulations by approaching the AAFES, and then by appeal to the Federal Labor Relations Council 12/ pursuant to Sections 4(c)(2), and 11(c)(2), (3) and (4)(i) and (ii) of the Executive Order.

12/ Herein referred to as the Council.

Discussion and Findings

1. Overall, I agree with the Hearing Examiner's conclusion in Case No. 41-1905 (CA) that the Exchange fulfilled its duty to negotiate with the Union within the meaning of Section 19(a)(6) of the Order.

However, I disagree insofar as the Hearing Examiner's findings can be read to imply that, standing alone, dilatory conduct by a party would not constitute a violation of Section 19(a)(6). In my view, Section 19(a)(6) must be construed in connection with Section 11(a) of the Order, 13/ which specifies that there is a bargaining obligation on the part of both agencies and labor organizations to "meet at reasonable times" and to "confer in good faith." I do not consider that the Exchange's excuses for delaying the negotiations in this matter, such as the busy holiday season and annual inventory, adequately meet the Executive Order's collective-bargaining requirements. Moreover, in this regard, it appears that the Exchange's chief negotiation spokesman was not connected with the Exchange's day-to-day activities and, thus, he would not be involved in its seasonal rush or inventory. Clearly, the purposes of the Executive Order are not served best where, as here, a labor organization achieves exclusive recognition in July, submits a complete collective-bargaining agreement proposal to the Activity the first part of October, and then waits until the middle of February, ostensibly, for the Activity to decide that it is now "convenient" to negotiate. Labor organizations having exclusive representative status have a right under the Order to prompt consideration of their bargaining request. Absent evidence of more plausible reasons for this kind of delay, such conduct by the Exchange ordinarily would amount to a refusal to meet at reasonable times with the employees' duly recognized exclusive bargaining representative, and would result in a finding of violation of Section 19(a)(6) of the Order.

However, in the circumstances of this case, and noting particularly that prior to January 1971, the Union did not press for immediate negotiations, and once negotiations began they were transacted with sufficient diligence, I do not find a violation of Section 19(a)(6). Although the Union further contends that the Exchange's negotiating method of considering the Union's proposed collective-bargaining agreement article by article and not submitting its own counterproposals in advance amounts to a refusal to confer in good faith, in my opinion, this is a legitimate bargaining approach. In addition, the record reveals that when difficulties did arise as to the substance of a particular Union-proposed contract provision, the Exchange never failed to provide, at a reasonable time, a substitute provision when such was considered possible. During the course of negotiations, then, all of the Union's bargaining agreement provisions were either accepted or rejected by the Exchange, or a substitute presented.

The Union argues that the instant negotiations were meaningless in that the Exchange's principal negotiator, an AAFES attorney, was not equipped with sufficient authority to conclude an agreement. This contention stems primarily from the fact that, at various points during the course of bargaining, the Exchange's spokesman indicated certain proposed agreement provisions could not be approved because they were contrary to AAFES regulations. On numerous occasions, he apparently stated that he was bound by these regulations in terms of what he could accede to at the bargaining table. Moreover, when the Union asked him to request possible changes in AAFES regulations from higher authorities, he refused to do so. Because some of the specific agreement provisions and regulations in dispute between the parties actually raise issues of the negotiability of the subject matter itself, and because discussion and concessions actually did take place as to other provisions, I reject the Union's contention that this conduct of the Exchange's principal negotiator violated the Order either in terms of his authority to bargain, or in terms of overall "good faith" bargaining.

As noted above, during the course of negotiations, the Exchange's spokesman took the position that the subject matter of certain Union proposals was contrary to AAFES regulations or the Order and, therefore, not negotiable. In my view, Section 11(c) of the Order 14/ provides the

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13/ Section 11(a) provides, in pertinent part, that: "An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual, published agency policies and regulations, a national or other controlling agreement at a higher level in the agency, and this Order."

14/ Section 11(c) provides that: "If, in connection with negotiations, an issue develops as to whether a proposal is contrary to law, regulation, controlling agreement, or this Order and therefore not negotiable, it shall be resolved as follows: (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.

exclusive method for resolving such a dispute. 15/ Thus, issues other than those involving the interpretation of a controlling agreement at a higher agency level, may bring immediately into play the processes of the Council as outlined in Section 4(c)(2), 16/ and Section 11(c)(4)(i) and (ii) of the Order. Under these latter provisions, negotiability disputes in connection with agreement negotiations are segregated into two categories: (4)(i) - disagreement with an agency head's determination that a proposal would violate applicable law, regulation of appropriate authority outside the agency, or this Order; and (4)(ii) - belief, by a labor organization, that an agency's regulation, as interpreted by the agency head, violates applicable law, regulation of appropriate authority outside the agency, or this Order.

Under these Section 11(c) procedures, the extent to which a particular agreement proposal or agreement subject may or may not have to be bargained about would be decided at the outset by the Council. Thereafter, under the Order's procedures, the Assistant Secretary may be required to determine whether the parties' bargaining in this regard has, in any way, violated Section 19 of the Order. The Report and Recommendations of the Study Committee, which preceded the Executive Order, sets out the policy and procedure as follows: "A labor organization should be permitted to file an unfair labor practice complaint when it believes that a management official has been arbitrary or in error in excluding a matter from negotiation which has already been determined to be negotiable through the processes described in /Section 11(c)/." The Report and Recommendations concluded that the Section 11(c) procedures are recommended in the hope that they will "give exclusively recognized organizations a way of resolving, during negotiations, questions as to whether a matter proposed for negotiation is in conflict with law, applicable regulations or a controlling agreement."

In these circumstances, I find as follows as to the four disputed subjects in the instant proceeding:

Arbitration. The record reveals that the parties fully discussed various arbitration procedures, but failed to reach agreement in the negotiation sessions prior to the October 2 meeting. At that time, the Exchange acceded to the Union's arbitration demand, although its agreement in this respect was then tied to the Exchange's "package deal" as to dues checkoff.

15/ See Report on a Decision of the Assistant Secretary, Report No. 26, in which I found that the intent of Section 19(a)(6) of the Order 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.

16/ Section 4(c)(2) provides: "The Council may consider, subject to its regulations-- (2) appeals on negotiability issues as provided in Section 11(c) of this Order."

Under these circumstances, in agreement with the Hearing Examiner, I conclude that the Exchange's bargaining on arbitration was not violative of Section 19(a)(6) of the Order. 17/

Hours of work. As noted above, the disputed hours of work issue involved two aspects. First, the Exchange refused to discuss, outright, the Union's proposal to change the basis for calculating overtime pay because of a conflicting AAFES regulation.

In accord with the Exchange's position in this respect, i.e., that the basis for calculating overtime is nonnegotiable because this subject is controlled by an existing AAFES regulation, I find that the Section 11(c)(2) procedure is applicable. Failing a satisfactory answer from the agency head the Union has available an appeal to the Council under Section 11(c)(4)(i) or (ii), as may be appropriate. This follows from the fact that the Exchange's refusal to bargain about the subject of overtime was based on a belief that, under the Order, the Exchange's overtime regulation could properly be used to eliminate any negotiations on the subject. Because this is a negotiability question which has not been decided by the Council prior to the filing of the unfair labor practice complaint herein, I conclude that this aspect of the instant complaint should be dismissed.

The second part of the hours of work issue involved the Exchange's refusal to agree to the Union's proposal to change the regularly scheduled workweek. Despite the fact that the Exchange contended that this subject was nonnegotiable under Section 11(b) of the Order, it not only discussed the Union's proposal, but also even went so far as to check into the practical application of such a change when applied to its current employee complement. Because the results of this scheduling survey called for more regular part-time employees and a reduction in the number of regular full-time employees, and hence, was unacceptable to the Union, an impasse resulted.

Notwithstanding the Exchange's willingness to bargain about some elements of workweek scheduling, I do not view this as a waiver of its fundamental position that the subject itself is nonnegotiable because it is governed by an existing AAFES regulation. Therefore, as in the overtime

17/ Nor does it appear that the Union could pursue Section 11(c) procedures on the subject of arbitration for there is no evidence of an Exchange contention that Union proposals concerning arbitration were nonnegotiable because they were contrary to law, regulation, controlling agreement, or the Order.

situation discussed above, the "Section 11(c)(2) - 11(c)(4) procedures" should have been followed. Accordingly, as this is a negotiability question which has not been decided by the Council prior to the filing of the unfair labor practice complaint herein, I conclude that this aspect of the instant complaint should be dismissed. 18/

Promotion. The Exchange's ultimate position as to the Union's promotion proposal was that promotion is a nonnegotiable subject under the Executive Order, citing, in particular, Section 12(a) and (b)(2). It contended also that an AAFES regulation governed promotion. The Exchange, however, did discuss the Union's promotion proposal and, as in the case of arbitration, it granted a portion of the Union's demand after the unfair labor practice charge in this proceeding was filed.

Again, notwithstanding this limited discussion and concession, because the subject of promotion herein also raises an issue of negotiability based on an existing agency regulation, it is a matter to be processed under the "Section 11(c)(2) - 11(c)(4) procedures." Accordingly, for reasons discussed above, the unfair labor practice complaint in this respect must be dismissed.

Dues checkoff. This subject was not raised until the final negotiation session when it was brought to the bargaining table by the Exchange in the form of an announcement of a new AAFES checkoff policy that any checkoff arrangement must be included in the negotiated agreement. Included in the wording of that policy is a statement which also, in effect, limits the duration of any agreed-to bargaining agreement to two years. Both of these topics, as interpreted and treated by the Exchange to dispense with any discussion of checkoff, quite obviously involve issues of negotiability, and their proper resolution is through the "Section 11(c)(2) - 11(c)(4) procedures" discussed above.

Accordingly, in agreement with the Hearing Examiner, no unfair labor practice complaint on these matters may be entertained by the Assistant Secretary at this time.

18/ The record clearly shows that the change in the workweek for all "Quick Shop" employees resulted from an apparent misunderstanding between the Exchange and the "Quick Shop" manager. In view of the Exchange's immediate notification of this fact to the Union and its offer to restore the prior workweek schedule, all coupled with the Union's concession that this was unnecessary, I conclude that further proceedings on this matter are unwarranted.

2. The Hearing Examiner concluded in Case No. 41-2130 (CB), that the Union did not refuse to negotiate in violation of Section 19(b)(6) as the evidence did not support the contentions that the Union denied proper authority to its chief negotiator and negotiation committee members for consummating a collective-bargaining agreement. He found also that the Union did not violate Section 19(b)(6) based on the expressions of its negotiators' displeasure with certain aspects of the Executive Order and with various Exchange policies and regulations. I agree.

The evidence is clear that all members of the Union's negotiation committee possessed the requisite power to agree to a final negotiated agreement and that any expressions by them of a need to refer a matter, such as dues checkoff, to some higher union authority merely reflected their desire for guidance in terms of the labor organization's national policy. Such conduct was comparable to that of the Exchange negotiation committee members who also expressed the need to keep their bargaining table agreements in conformity with AAFES policies and regulations. In neither instance is this, standing alone, a basis for concluding there was a lack of bargaining authority at the installation level. The evidence also is clear that Union committee members, although vocally expressive of their lack of sympathy with portions of the Executive Order, as well as with certain Exchange policies and regulations, were merely expressing their own point-of-view, and were not, thereby, refusing to negotiate within the meaning of Section 19(b)(6).

Therefore, I adopt the Hearing Examiner's recommendation in Case No. 41-2130 (CB) that the Section 19(b)(6) allegation in the complaint be dismissed.

Although the Hearing Examiner made no specific reference to the Section 19(b)(1) allegation in the complaint herein, simply recommending dismissal of Case No. 41-2130 (CB) in its entirety, I find no independent evidence of Union interference with, restraint, or coercion of employees in the exercise of rights assured by this Order.

Accordingly, I conclude that the Section 19(b)(1) allegation in Case No. 41-2130 (CB) also should be dismissed.

ORDER

Pursuant to Section 6(a)(4) of Executive Order 11491 and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the complaints in Case Nos. 41-1905 (CA) and 41-2130 (CB) be, and they hereby are, dismissed.

Dated, Washington, D. C.
March 28, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

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

ARMY AND AIR FORCE EXCHANGE SERVICE
KEESLER CONSOLIDATED EXCHANGE

Respondent 1/

and

CASE NO. 41-1905(CA)

LOCAL 2670, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Complainant

LOCAL 2670, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Respondent

and

CASE NO. 41-2130(CB)

ARMY AND AIR FORCE EXCHANGE SERVICE
KEESLER CONSOLIDATED EXCHANGE

Complainant 1/

Rex H. Reed, Esq., of Army and Air Force Exchange Service, Dallas, Texas, for the Army and Air Force Exchange Service, Keesler Consolidated Exchange.
Bruce I. Waxman, Esq., of the American Federation of Government Employees, AFL-CIO, Washington, D.C., for Local 2670, American Federation of Government Employees, AFL-CIO.

Before: Henry L. Segal, Hearing Examiner

1/ Name as amended at the hearing. Although in the Notice of Hearing in Case No. 41-1905(CA) the Agency is designated as the "Activity," I am, in accordance with established practice in unfair labor practice proceedings, designating the Agency as the "Respondent."

REPORT AND RECOMMENDATIONS

Statement of the Case

This consolidated proceeding, heard at Biloxi, Mississippi, on February 4 and 5, 1971, and on April 6, 1971, arises under Executive Order 11491 (herein called the Order) pursuant to Notices of Hearing and an Order Consolidating Cases issued by the Regional Administrator of the Labor-Management Services Administration, United States Department of Labor, Atlanta Region. His Notice of Hearing issued on December 18, 1970, in Case No. 41-1905(CA) and on January 20, 1971, in Case No. 41-2130(CB), and his Order Consolidating Cases Nos. 41-1905(CA) and 41-2130(CB) issued on January 20, 1971. The proceeding was initiated by a Complaint filed by Local 2670, American Federation of Government Employees, AFL-CIO (herein called the Union) in Case No. 41-1905(CA) on August 12, 1970, 2/ and by a Complaint filed by Army and Air Force Exchange Service, Keesler Consolidated Exchange (herein called the Exchange) in Case No. 41-2130(CB) on or about January 20, 1971.

At the hearing both parties were represented by counsel who were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, submit oral argument and file briefs. 3/ Upon the entire record in this matter, 4/ from observation of the witnesses and after due consideration of the briefs filed by the parties, 5/ I make the following:

2/ At the hearing the Union moved to amend its complaint to allege that the totality of conduct of management including all persons who have acted for management from October 1, 1969, to date, has been such as would show a refusal to negotiate during the course of negotiations. I granted the motion.
3/ Each Respondent moved at the hearing that the respective complaint against each be dismissed. I advised that I would defer rulings on their motions for the Assistant Secretary for Labor-Management Relations, and would make recommendations with respect to the disposition of the cases in my report and recommendations. My recommendations are set forth below.
4/ By motions dated May 4 and May 6, 1971, counsel for the Union moved to correct the official transcript in certain respects. I am hereby granting the motions. These corrections, as well as required corrections with respect to the numbering of exhibits, are attached hereto as Appendix A.
5/ Both parties requested at the hearing that time for filing briefs be extended to May 17, 1971, and briefs were timely received on that date.

Findings and Conclusions

I. The Issues

In Case No. 41-1905(CA) filed by the Union, the principal issue is whether in the course of negotiations between the Union and the Exchange, the Exchange engaged in such conduct as would constitute a refusal to consult, confer, or negotiate with a labor organization within the meaning of Section 19(a)(6) of the Order. In Case No. 14-2130(CB) filed by the Exchange, the principal issue is whether the Union refused to consult, confer, or negotiate with an Agency within the meaning of Section 19(b)(6) of the Order.

The Union's basis for its contention that the Exchange violated the Order appears to hinge on the specific allegations that the Exchange engaged in dilatory tactics in delaying the start of negotiations; that the principal negotiator for the Exchange lacked the authority to conclude an agreement; that the Exchange failed to give meaningful proposals with respect to certain subjects of negotiation; that the Exchange unilaterally changed conditions of employment; that some of the Agency regulations governing personnel of the Exchange are unlawful; and that the Exchange as evidenced by its general course of negotiating came to the table with a "closed mind."

On the other hand, the Exchange's basis for its contention that the Union violated the Order hinges on the specific allegations that the Union's principal negotiator and negotiation committee lacked the authority to conclude an agreement; that the Union's negotiating committee evidenced an attitude of hostile contempt for the Order, pertinent Department of Defense directives and Exchange regulations.

II. The Representative Status of the Union

The Union won a representation election conducted on June 20, 1969, under the previous Executive Order, No. 10988, and by letter dated July 3, 1969, was granted exclusive recognition for a unit of:

> "All regular full time and regular part-time hourly paid civilian employees employed by the Keesler Consolidated Exchange at Keesler Air Force Base, Mississippi, excluding temporary full time, temporary part time and casual employees; supervisory, managerial and management trainee employees; military personnel employed during off-duty hours; professional employees; employees engaged in personnel work; guards; watchmen; all employees of the Southeast Area Support Center and the employees at all other installations within the Keesler Consolidated Exchange." 6/

Even before the election, held on June 20, 1969, the Exchange had granted formal recognition to the Union. Although the Army and Air Force Exchange Service (herein called AAFES) is a nonappropriated fund instrumentality and as such was not subject to Executive Order 10988, it adopted a policy of voluntarily abiding by the terms of that Order. Employees of nonappropriated fund instrumentalities of the United States are now covered by Executive Order 11491. (See Sec. 2(b) of the Order.)

6/ The Exchange raised a new defense to the Union's complaint for the first time in its brief. The unit recognized at Keesler excludes "military personnel employed during off-duty hours." The Exchange argues that since the Assistant Secretary for Labor-Management Relations recently held that such military personnel should be included in an appropriate unit, White Sands Exchange, A/SLMR No. 25; Southern California Exchange Region, A/SLMR No. 26; MacDill Air Force Base Consolidated Exchange, A/SLMR No. 29; and Alaskan Exchange System, A/SLMR No. 32, the unit is inappropriate and there is no duty to bargain for an inappropriate unit. Such a defense falls for various reasons. The status of the military personnel employed part time at the Exchange was not litigated to ascertain whether they meet the criteria set by the Assistant Secretary in the above cited cases for inclusion. Moreover, an election was conducted pursuant to agreement of the parties in the unit recognized, and the Exchange cannot now use as a defense to refusal to negotiate that a unit it has already recognized is inappropriate. The court cases in the private sector cited by the Exchange are distinguishable and not applicable to this situation. It is also my opinion that the unit, although it excludes a category of employees which the Assistant Secretary might include, is not repugnant to the policy of the Order.

A. The Negotiation Teams and Times of Negotiations.

The Union presented a proposed agreement to the Exchange in October, 1969. At that time labor relations in the Army and Air Force Exchange Service (AAFES) were under the purview of the installation commanders, in this case the Base Commander, Keesler Air Force Base. However, in September, 1970, with a change in the method of management in the AAFES, labor relations were placed under the purview of the individual Exchange Managers, in this case the Keesler Consolidated Exchange Manager.

The Union was told by an installation official that the first meeting would be held in November, 1969, but it was delayed by the Exchange because of the necessity of transmitting the Union's proposals to AAFES Headquarters in Dallas. Meetings were also not conducted in December, 1969, because of the busy holiday season at the Exchange and in January, 1970, because of inventory. The reasons for the delays were communicated to the Union by the Exchange. Subsequently, negotiation sessions were conducted on dates and during hours as follows:

February 10, 1970	--	2:00 p.m.	to	3:00 p.m.
February 11, 1970	--	10:00 a.m.	to	4:00 p.m.
February 12, 1970	--	10:00 a.m.	to	4:15 p.m.
February 13, 1970	--	10:00 a.m.	to	12:00 noon
February 16, 1970	--	2:00 p.m.	to	6:00 p.m.
February 17, 1970	--	2:00 p.m.	to	6:00 p.m.
February 18, 1970	--	2:00 p.m.	to	3:00 p.m.
March 16, 1970	--	2:00 p.m.	to	5:00 p.m.
March 17, 1970	--	2:00 p.m.	to	5:15 p.m.
March 19, 1970	--	2:00 p.m.	to	4:30 p.m.
April 23, 1970	--	2:00 p.m.	to	6:00 p.m.
April 24, 1970	--	2:00 p.m.	to	3:15 p.m.
October 2, 1970	--	11:00 a.m.	to	2:00 p.m.

The April 23 and 24 sessions were conducted with a Federal mediator, Mr. J. C. Pearce, from the Federal Mediation and Conciliation Service (the Union had requested a mediator for these sessions), and the October 2, 1970 meeting was conducted with another Federal mediator from the Federal Mediation and Conciliation Service, a Mr. Berman (the Exchange had requested a mediator for this session).

The Union did not request any negotiation sessions between April 24, 1970, and October 2, 1970, and has not requested any since October 2, 1970.

The chief spokesman for the Exchange was John W. Bowlin, Assistant General Counsel from AAFES headquarters in Dallas, Texas, and chief spokesman for the Union was Morris E. Adams, its local president. There were a total of five individuals on the Union team and four on the Exchange team.

B. The Ground Rules for Negotiations.

At the request of the Union, ground rules for the negotiations were agreed to at the first meeting on February 10, 1970, and were embodied in a document dated February 11, 1970.

In substance, the ground rules set forth the composition of the negotiating teams, designated the place of meetings, provided for use of technical specialists as desired, provided for the hours of the sessions to be held on February 11, 12, and 13, 1970, and that if further meetings were required by either party mutually acceptable dates would be established. It further included procedures for handling impasses and for completion of the agreement, as follows:

> Procedure For Handling Impasses. If after three negotiating sessions (three separate days) an issue has not been resolved, no later than 30 calendar days after the end of the third session attempt at resolution the parties agree to submit the issue to the Federal Mediation and Conciliation Service for an attempt at resolution. If the Federal Mediators' decision on such issue is unacceptable to either party, the issue will then be submitted to the Federal Service Impasses Panel for resolution in accordance with applicable directives.
>
> Completion Of Agreement. Upon reaching agreement on each article or sub-article, the spokesmen for both parties shall signify such agreement by initialing the agreed-upon item. This shall not preclude the parties from reconsidering or revising the agreed-upon items until a whole agreement is reached. No article or part of the agreement is approved until the total agreement is approved. Upon

completion of the total and final agreement acceptable to both negotiating parties, the total agreement will be prepared in final form by the employer. After review and approval by both parties, the spokesman for each negotiating team will initial all the articles of the agreement, subject to final approval required by both parties, ratification by the union membership and approval by the employer in accordance with applicable regulations. The effective date of the agreement will be the date approved by the Chief, AAFES.

C. Items of Agreement.

During the course of negotiations the parties reached agreement on approximately 17 items either by deleting some Union items, agreeing to the Exchange's revisions of some, or adopting items as proposed by the Union. Such items as recognition, purpose, savings bond program, governing regulations, employee rights, equal opportunity, provisions for excused times for stewards without loss of pay for performance of valid duties, use of bulletin boards, use of Exchange facilities for conducting official business, printing of agreement by the Exchange, wage surveys, certain employee benefits, reduction in force plan, sub-contracting, and duration of agreement were agreed to.

D. Open Items.

The items on which agreement has not been reached are promotions, grievance and arbitration, dues checkoff and hours of work. Prior to discussion of these items individually, it is relevant to discuss certain general matters applicable to all of the open items.

The principle negotiator for the Union, President Adams, is an employee of the Air Force at Keesler Air Force Base, and is not an employee of the Exchange. His local holds an agreement for certain employees at Keesler other than employees of the Exchange, and those employees are subject to the Federal Personnel Manual of the United States Civil Service Commission. Adams and his committee often referred to the Federal Personnel Manual and sought agreement incorporating some provisions in accord with the Federal Personnel Manual. However, the Exchange is subject to other regulations and its employees are not covered by the Federal Personnel Manual.

President Adams and other Union negotiators often expressed displeasure at the Regulations which the Exchange negotiators urged were binding on them, as well as the provisions of the Order pertaining to negotiation of agreement.

Many times during negotiations Chief Exchange Negotiator Bowlin and others would indicate that if they agreed to certain Union proposals they would lose their jobs, or "it would be their tail." But, such statements were invariably made in the context of contentions by the Exchange negotiators that the specific Union proposal being discussed was not in accord with the regulations and published agency policy governing personnel of the Exchange.

On the other hand, at certain times during negotiations, Union Negotiator Adams would state that he had to check with Griner (John Griner, President of the AFGE) on the Exchange's proposals principally with respect to dues checkoff. But, such checking was based on the need to stay within the bounds of national union policy with respect to matters under negotiation.

At the April 23 and 24, 1970 negotiation sessions at which Federal Mediator Pearce was in attendance, Pearce held separate meetings with the opposing teams. According to Union President Adams, Pearce advised him that the Exchange team had promised to give the Union new counter-proposals on all four open items, but the Exchange team only presented a new counter-proposal on hours of work on April 24, 1970. According to Chief Exchange Negotiator Bowlin, he told Pearce he could not depart from regulations but promised to "sweeten" the language on hours of work. He did so by presenting a proposal on hours of work to the Union on April 24, 1970, which was substantially the same as previous proposals, but with some change in language. At the October 2, 1970 meeting held with Federal Mediator Berman, the Exchange presented proposals on all open items, some new and some the same as previously offered. However, the Exchange made these proposals with the condition that all must be accepted in order to complete an agreement, that they were not open to acceptance on an individual basis. The various proposals will be noted in the following discussion of the open items.

(1) Checkoff of Dues.

During the period of time between the grant of formal recognition to the Union under Executive Order 10988 and the election in 1969 leading to exclusive recognition, the Exchange and Union executed a Memorandum

of Understanding setting forth responsibilities and procedures, conditions and requirements for withholding and remitting the dues of the members in good standing in the Union included in the appropriate unit who voluntarily authorize allotments of pay for this purpose. This memorandum, approved July 11, 1968, contains no termination date, and is still in effect. The Union, satisfied with these arrangements, made no proposals for inclusion of a checkoff provision in the negotiated agreement. On the other hand, the Exchange took the position throughout the course of negotiations that checkoff must be included as part of the agreement because of Agency Regulations, and proposed a clause headed "Deduction of Labor Organization Dues." The initial paragraph provided for the termination of the dues checkoff agreement between the Union and the Exchange dated July 11, 1968, and that the dues checkoff provisions (set forth in the proposed clause) would govern in accordance with Exchange Service Bulletin No. 58, dated May 29, 1970. Exchange Service Bulletin No. 58 was issued from the Headquarters of AAFES and signed for the Chief of AAFES by its Executive Director. The Bulletin sets forth required provisions for dues checkoff, and specifically provides, "Where a labor organization holds or obtains exclusive recognition, the dues withholding procedures, if any, will be a part of the collective bargaining agreement and will terminate concurrently therewith. All agreements are subject to and become effective on the approval of the Chief, AAFES. They may not exceed two years in duration." At times, negotiators for the Exchange stated to the Union that in view of Exchange Bulletin 58 they could discontinue the checkoff in force under the July 11, 1968 agreement, however the Exchange has not done so. Of course, the Union's objection to incorporating a checkoff clause in the agreement is that under Exchange Bulletin 58, a checkoff provision in an agreement would expire at the same time as the agreement. The issue of incorporating a checkoff provision in the agreement appears to be the main reason for the failure of the parties to arrive at a final agreement. At any rate, the Exchange's proposals throughout negotiations was that dues checkoff must be incorporated in the agreement in compliance with Exchange Bulletin 58, and at the last negotiation meeting on October 2, 1970, the Exchange's proposed clause was in accord with that bulletin.

(2) Promotions.

The main difference between the parties preventing agreement on promotions was with respect to the criteria to be used for promotions. The Exchange took the position that it was bound by the joint

regulations of the Army and Air Force governing "Exchange Service Personnel Policies," AR60-21/AFR 147-15. These regulations provide at paragraph 4-2 that "Employees are selected for promotion on the basis of performance, potential, length of AAFES service, and veteran status, in that order of importance." The Union's original proposal on promotions stressed seniority as the principal criterion. Throughout the negotiations, the Union indicated its disapproval of certain of the criteria set forth in the regulations. For example, it indicated that veteran's status was discriminatory against women, and there were many women employed by the Exchange. The Exchange responded that with the advent of World War II women could join the military and that many women employed by the Exchange were veterans. The Union proposed that since the parties were bound by the regulations as to criteria, that a set numerical weight be negotiated for each criterion. The Exchange responded that this would be contrary to its regulations, that it must maintain flexibility in promotions, that under the Executive Order at Section 12 management was given the retention of the right to promote.

During the negotiations, the Exchange agreed to many proposals of the Union with respect to promotion procedures such as posting of vacancies, and presented proposed language on such procedures. As part of the package for resolution of the open items presented at the October 2, 1970 negotiation meeting, the Exchange presented a written proposal on promotions. This proposal set up procedures for posting vacancies, methods of applying for promotion, a procedure for explaining to unsuccessful candidates the qualifications of the successful candidate, and methods of selecting the top five candidates from which one would be selected. Further, while the proposal contained the criteria set forth in AR 60-21/AFR 147-15, it provided that veteran's status would only be used to break a tie if two or more candidates for promotion were equal upon application of the other criteria.

(3) Hours of Work.

The Union proposed that the regular scheduled work week should consist of five consecutive eight-hour days with two consecutive days off and overtime pay for all hours worked in excess of eight hours per day or 40 hours per week. The Exchange took the position at negotiations that the standard work week should continue to be 40 hours with hours scheduled for six days permitting one day off.

AR 60-21/AFR 147-15 provides with respect to work week at paragraph 2-14b, "The regular scheduled workweek will not exceed 40 hours. Except where inconsistent with operational needs, the hours scheduled will not exceed eight hours per work day and will not be scheduled for more than five days in an administrative workweek. The regular scheduled workweek will not include hours on more than six days or include more than ten hours on any one workday, except during an annual or other directed inventory." Paragraph 2-22a. provides with respect to overtime, "Only time worked in excess of 40 hours during the administrative workweek is considered overtime work." Thus the regulations governing personnel of the Exchange would permit either a workweek as sought by the Union or as presently in force at the Exchange, but would not permit overtime for work in excess of 8 hours on a specific day.

The Exchange advanced the following reasons for its position that it must retain a six-day week. The hours that the operations of the Exchange must remain open for business are set by the Base Commander of Keesler Air Force Base. Various operations of the Exchange are open seven days a week. Studies of the traffic pattern of customers, which the Exchange had available at the negotiations and were offered for perusal by the Union, indicated that it would be economically unfeasible to operate on a five-day week with full-time employees.

The Union offered to show that many private retail operations in the area which were open seven days a week gave their employees five-day weeks. The Exchange's response was that such private operations utilize more part-time employees, and it offered to adopt a five-day week with two consecutive days off if the Union would agree to permit it to use more part-time employees and less full-time employees. The Union's position on this proposal at first was that it would lose the number of employees in the unit. Of course, as pointed out by the Exchange, this position was without basis since the unit includes regular part-time employees, and only temporary or casual employees are excluded. 7/ The Union also

7/ Regular full-time employees are those expected to work for a period of more than 90 days with a scheduled workweek of 35 to 40 hours. Regular part-time employees are those expected to work for a period of more than 90 days with a scheduled workweek of 16 to 35 hours. Temporary or casual employees are employed for periods of less than 90 days.

took the position that it did not wish to delete the number of full-time employees because of the greater benefits enjoyed by full-time employees.

The final written proposal submitted by the Exchange with respect to workweek on October 2, 1970, which was substantially similar to the proposal made on April 24, 1970, at the request of Federal Mediator Pearce, provided that except where inconsistent with operational needs, the hours scheduled would not exceed eight hours per workday and would not be scheduled for more than five days in an administrative workweek. Further, it provided that the regular scheduled workweek would not include hours on more than six days or include more than ten hours in any one workday, except during an annual or other directed inventory. Provision was also made for posting of changes in the regular scheduled workweek at least two weeks prior to the effective date except in cases of emergency or extraordinary business need. Finally, the proposal stated that frequent changes of the regular scheduled workweek would not be made.

In connection with the issue of workweek, the Union alleged a unilateral change in workweek to a five-day week in the "Quick Shop." 8/ The record indicates that the "Quick Shop" for many years had some of its more senior employees on a five-day week depending on operational needs. During negotiations, in view of the Union's proposal for a standard five-day week, the various facility managers of the Exchange as a survey of feasability were requested to attempt to work up five-day workweek schedules. The manager of the "Quick Shop" did so, but in error instituted five-day workweeks for more employees, but not all, in the shop. This raised the total of employees enjoying five-day workweeks in the "Quick Shop" to approximately 12 of a total of 35 employees. At the next negotiation session, the Exchange's Chief Negotiator, Bowlin, advised the Union of the error and offered to move the employees recently given the five-day week back to their previous schedule. The Union declined.

(4) Grievance and Arbitration.

The differences between the parties with respect to this open item were basically restricted to the last step of the grievance procedure, arbitration. The Union's proposal provided for a paid

8/ The "Quick Shop" is a fast in-and-out operation for the sale of certain standard food products.

arbitrator. The Exchange argued during negotiations that there was no provision in its budget for paying outside arbitrators. It pointed out that the profits of the Exchange were for the Central Servicemen's Relief Fund which was used for relief of servicemen and their families, recreational equipment and for like uses, and costs of arbitration would eat into those profits. Further, it argued that an outside arbitrator would not be as familiar with the regulations governing the Exchange as some one connected with the Army or Air Force. In March, 1970, it proposed the various steps of a grievance procedure substantially in line with the Union's proposals, except for the final step. For a final step it proposed that if either party determined that a hearing is necessary, a hearing officer should be selected from a list of five names submitted by the Installation Commander; that these names would be either military or civilian personnel under the jurisdiction of the Installation Commander, but would not include employees of the employer; that the parties would meet five days thereafter and if they could not mutually agree on a hearing officer, each party would alternately strike one name and the remaining name would be the duly selected hearing officer. Further, the Exchange's proposal provided that the hearing would be advisory with any recommendation subject to the final decision of the Installation Commander. Of course, the Union continued to opt for compulsory arbitration with an outside arbitrator as the final step.

Finally, on October 2, 1970, as part of its package proposal to close all open items, the Exchange proposed (in accord with the Union's demand) a final step calling for compulsory arbitration, sharing of the cost of the arbitrator between the Union and the Exchange, and selection of the arbitrator from a list of five to be selected by the Federal Mediation and Conciliation Service.

CONCLUSIONS

A. Case No. 41-1905(CA)

The Union makes numerous specific allegations of violations which it contends add up to a totality of conduct showing a general refusal to consult, confer or negotiate with a labor organization as required by Section 19(a)(6) of the Order.

Turning first to the allegation of dilatory tactics. It is clear that the Exchange caused an undue delay in the commencement of negotiations, approximately 3 1/2 months elapsing between the Union's submission of its original proposal in late October, 1969, to the commencement of negotiations in February, 1970. However, I cannot conclude that the delay was an intentional strategy by the Exchange to frustrate the Union's negotiation effort. In assessing the effect of a delay in initiating negotiations, consideration must be given to the reasons for the delay and the course of negotiations once negotiations began. Part of the delay was due to the busy holiday season always occurring in the month of December and the Exchange's taking of inventory in January. Once the negotiations started, there were 13 negotiation sessions held between February 10, 1970, and October 2, 1970, and admittedly the lack of negotiation sessions thereafter were not the fault of the Exchange. 9/ At the sessions, as will be discussed more fully hereafter, agreement was reached on many items and on the items in which there was no agreement the Exchange met its obligation to consult, confer or negotiate in good faith with the Union within the framework of the Order. In this posture, while I do not condone the delay in commencing negotiations, I cannot conclude that it constituted such a refusal within the meaning of Section 19(a)(6) of the Order as would require a remedy. Moreover, it is difficult to say that the delay was designed to frustrate the Union where the Exchange, a nonappropriated fund instrumentality not subject to the previous Executive Order, No. 10988, voluntarily recognized the Union under that Order. Executive Order No. 11491, which does cover nonappropriated fund instrumentalities, did not take effect until January 1, 1970, and negotiations commenced approximately one month thereafter.

9/ It is noted that the Exchange more than fulfilled the requirements of the Ground Rules for Negotiations negotiated at the first session with respect to times of meeting.

In his brief, Union counsel cites several cases which arose in the private sector for the proposition that dilatory tactics constitute a refusal to negotiate. Before commenting on the specific cases, general observations are valid with respect to the application of cases in the private sector. (These observations are relevant to any discussion hereafter of such cases and will not be repeated.) Decisions in the private sector are not controlling on the Assistant Secretary but he will take into account experience gained from the private sector under the Labor-Management Relations Act, as amended. Charleston Naval Shipyard, A/SLMR No. 1. Moreover, in the context of Section 19(a)(6) of the Order, sections 11 through 15 of the Order dealing with negotiations and other matters concerning agreements, and section 17 dealing with Negotiation Impasses are unique and have no counterpart in the Labor-Management Relations Act, as amended, thus making much of the experience gained under that Act inapplicable to the Federal Sector.

In all of the Labor-Management Relations Act cases cited by Union Counsel, dilatory tactics were only one indicia of a refusal to negotiate, and in finding violations the National Labor Relations Board looked at the total conduct which included other indicia not present in this case; e.g., in M. & M. Bakeries, Inc., 121 NLRB No. 172, enf'd. in NLRB v. M. & M. Bakeries, Inc. (CCA 1), 271 F.2d 602, among other things, the Employer refused to meet at all when a strike was threatened, and when a strike started threatened to fire strikers if they did not return. When some strikers sought to return, the Employer discontinued their seniority. In Chevron Oil Co., 182 NLRB No. 64, the National Labor Relations Board in finding a refusal to bargain depended on other indicia in addition to delays in setting negotiation meetings, such as hostility demonstrated to the labor organization in the pre-election period, attempts to cause employees to abandon the Union, insistence on a no-strike clause without offering an arbitration provision, failure to give information relevant to meaningful bargaining, and withholding of wage increases from unit employees which were given to non-unit employees. Moreover, very recently the U. S. Court of Appeals for the Fifth Circuit reversed the National Labor Relations Board on its finding of a refusal to bargain in the Chevron case, finding instead that the Employer only engaged in "hard bargaining." Chevron Oil Co. v. NLRB (CCA 5, No. 29789, May 4, 1971), 77 LRRM 2129.

Turning now to the Union's allegation that the Exchange's chief negotiator, John Bowlin, an attorney from AAFES headquarters in Dallas, Texas, lacked authority to consummate an agreement, the evidence shows otherwise. Apparently, the Union bases its allegation on the fact that at times Bowlin indicated he would lose his job if he agreed to demands which would be contrary to AAFES regulations or AR 60-21/AFR 147-15, the joint Army and Air Force regulations governing the Exchange Service. Counsel for the Union cites cases in the private sector where insistence on retention of employer policy and practices was found by the National Labor Relations Board to be an indicia of an unlawful refusal to bargain. (In these cases other indicia was also present.) However, as noted, the Executive Order contains provisions unique to the Federal Sector. Thus, Section 11(a) of the Order recognizes that the parties shall confer with respect to working conditions so far as may be appropriate under applicable laws and regulations including, among other things, published agency policies and regulations. Section 11(c) of the Order sets forth a procedure for contesting agency regulations. Also, Section 12 of the Order provides that an agreement between a labor organization and an agency is subject to published agency policies and regulations in existence at the time the agreement was approved. Thus, under the Order, Bowlin was justified with respect to certain subjects of negotiation, in urging that he was bound by policy and regulations governing the Army and Air Force Exchange Service. Bowlin's conduct at negotiations revealed that he had full authority to negotiate within the framework of the Order.

The Union also alleges that the Exchange's method of counter-proposal and the ultimate package deal was violative of Section 19(a)(6) of the Order. Again, Counsel for the Union cites cases in the private sector where the National Labor Relations Board looked on failure to submit counter-proposals as an indicia of refusal to negotiate by the Employer. But, in all of those cases there existed other indicia which made up a totality of conduct constituting a refusal to bargain under the Labor-Management Relations Act. Thus, for example, in Portage Realty Corp., 184 NLRB No. 4, 74 LRRM 1491, the employer merely rejected proposals out-of-hand and made no counterproposals. At the same time, in that case, during the course of negotiations, the employer advised employees that it was going to reject the union in future bargaining, bargained with employees directly on take-home pay and unilaterally offered wage increases to strikers to

persuade them to abandon the strike. In the instant case, the Exchange did not engage in such activity. But, of more significance, the Exchange did present counterproposals, as will be discussed more fully below. Although it did not present them in one package, it presented them on a subject-to-subject basis. The Order requires the Exchange to consult, confer or negotiate. There is nothing in the Order which requires an agency in order to meet the requirement of the Order to present counterproposals in one bundle early in negotiations.

Union counsel also contends that the package proposal on all open items presented on a take-it-or-leave-it basis by the Exchange at the last session in October 1970, constituted a refusal to confer, consult or negotiate. The Union points to the ground rules negotiated at the first session which provide that the parties may reach agreement upon each article or subarticle. However, the ground rules also provide that agreement on specific articles does not preclude the parties from reconsidering or revising the agreed-upon items until a whole agreement is reached. Further it provides, "No article or part of the agreement is approved until the total agreement is approved." The Exchange did not take a "take-it-or-leave-it" position until the final session, when in an attempt to wrap up a complete agreement, the Exchange presented a package. Such bargaining tactic at the end of a long series of negotiations is common among negotiators where only a few items remain open. Moreover, after the package was refused, the Exchange did not refuse to meet further. With respect to the effect of the"ground rules," although I do not believe that the Assistant Secretary, in determining whether an agency has met its obligation to confer, consult or negotiate within the meaning of the Order, is required to interpret ground rules where they exist, and assure that there is strict compliance with such rules, I am of the opinion that the Exchange's package deal at the last session was permissable under the provisions of the ground rules set forth above.

In my discussion above, I concluded generally that the Exchange did present counterproposals and that on certain subjects of negotiation the Chief Negotiator for the Exchange justifiably gave effect to published agency policy and regulations. I will now turn to a discussion of specific items.

First, it is clear that some 16 or 17 items out of approximately 22 proposed were agreed upon by the parties. Union counsel characterizes them as unimportant. However, it is my opinion that all agreed-upon items are of some importance if they deserve to be

included in an agreement. Moreover, such items as the grievance procedure (agreed to early in negotiations except for arbitration), use of stewards, use of bulletin boards, use of exchange facilities for conducting official union business, reduction-in-force plan, certain employee rights and a subcontracting clause are items of real substance in a meaningful relationship between a union and an agency. More important, the ability to arrive at an agreement on these items is a strong indication that the Exchange did negotiate in good faith. With respect to the open items, all were discussed in great detail.

During the course of negotiations, as noted above, a grievance procedure short of arbitration was agreed to early in negotiations. Union counsel seems to argue that the Exchange refused to negotiate with respect to binding arbitration. However, there is nothing in the Order which requires that an agency grant binding arbitration. During negotiations, the Exchange did offer an alternative to arbitration by providing for hearings, using as hearing officers either military or civilian personnel under the jurisdiction of the installation commander other than employees of the Exchange. It gave economics and the fact that outsiders would not be familiar with agency regulations as reasons for not wishing to agree to outside arbitrators. Finally, at the October 2, 1970 meeting in order to attempt to wrap up a final agreement the Exchange did offer binding arbitration as part of its package. Certainly, the Exchange met its obligation to consult, confer or negotiate in good faith with the union with respect to arbitration. "Consult," "confer," or "negotiate" does not mean that an agency must agree to a union's demands.

With respect to promotions, the Exchange justifiably took the position that it was bound by published agency regulations concerning the criteria to be considered in making promotions in view of Sections 11(a) and 12(a) of the Order discussed above. It did agree to a promotion procedure such as posting and selection of lists of qualified candidates. The Union requested that a specific numerical weight be given to each criteria, the Exchange refused, pointing out that management officials under Section 12(b)(2) retain the right to promote employees. 9/

9/ Counsel for the Exchange argues in its brief that Sec. 12 of the Order preserves for management the right to promote, transfer and assign employees. Accordingly, it avers that promotions are non-negotiable under the Order. It is my opinion that although management retains the ultimate right to promote, certainly, subject to agency regulations and published agency policy, procedures and criteria to be used for promotion are negotiable.

Here, I consider that the Exchange merely engaged in "hard bargaining." Again, there is no requirement that an agency accede to the Union's demands in order to comply with Section 19(a)(6) of the Order. The bases for promotion set forth in the applicable Army and Air Force Regulation, performance, potential, length of AAFES service, and veteran status, in that order of importance, appear to be legitimate criteria. The Union voiced its greatest objection to the use of veterans' status as a basis on the rather tenuous ground that it discriminated against women. The Exchange in its final package proposal agreed that veterans' status would only be used to break a tie between candidates which resulted from applying the other three criteria.

With respect to the issue of the five-day week, the Exchange discussed it in great detail during negotiations, giving various reasons based on its seven-day operations why it could not go on a standard five-day week for all employees. It went so far as to ask its managers to make up schedules to ascertain whether it would be feasible and offered to grant a standard five-day week if it could add more part-time employees and decrease the number of full-time employees. (The unit includes part-time employees.) In its proposals, the Exchange provided for a five-day week where feasible as well as procedural safeguards for candidates for promotion, while retaining a standard six-day week. The fact that the Exchange would not concede does not make the Exchange guilty of a violation of Section 19(a)(6) of the Order. As mentioned earlier, the Order does not require an agency to grant a labor organization's demands, it merely requires that the agency consult, confer or negotiate. This the Exchange did, although in a manner which may be characterized as "hard bargaining."

It was in connection with the issue of the five-day week, that the allegation of a unilateral change in working conditions arose. However, the Exchange, for many years, has provided a five-day week for employees, usually more senior ones, where it was practical. In the "Quick Shop" where the alleged unilateral change occurred a certain number of employees always enjoyed a five-day week. As a result of the survey called for by management to determine if a five-day week for all employees was feasible, the manager of the "Quick Shop" mistakingly added more employees (for a total of approximately 12 out of 35 employees) to those enjoying a five-day week. Management advised the Union of the "mistake" at the very next negotiation session and offered to restore the "status quo." Under these circumstances I cannot

conclude that the Exchange made unilateral changes designed to derogate the status of the Union. In fact, realizing the mistake made, the Exchange offered a remedy to the Union, which would be substantially the same as one I would provide if I concluded that a remedy was necessary.

On the issue of allotment of dues, Union counsel cites cases in the private sector where the National Labor Relations Board has held that where opposition by an employer to dues deductions is designed to damage the Union and frustrate the bargaining procedure the employer has committed an unfair labor practice. But this is not true of the Exchange. The Exchange at no time has refused to grant check-off of dues. It voluntarily granted dues allotments after formal recognition was granted to the Union under Executive Order No. 10988. Now, during negotiations, it sought to include the dues check-off provision in a negotiated agreement because of the advent of Exchange Bulletin No. 58 which set forth as published agency policy a requirement that such provisions be included in negotiated agreements. (The Exchange is continuing to check off dues under the existing agreement.) As noted above, Section 11 of the Order provides that the parties should meet and confer in good faith with respect to matters affecting working conditions so far as may be appropriate under applicable laws and regulations, including among other things, published agency policies and regulations. The Union, in its arguments that the existing dues allotment agreement executed in 1968 should remain in force and not be made part of the negotiated agreement, places great stress on the fact that Exchange Bulletin 58 was not issued until May, 1970, after negotiations had commenced. I cannot give any weight to this argument. A complete agreement had not been concluded by that time, and the Exchange negotiators under the Order were justified in negotiating subject to that Bulletin. 10/ There is no showing that AAFES

10/ Although the dues allotment memorandum of understanding dated July 11, 1968, is alleged by the Union to be binding and it need not now negotiate with respect to dues check-off, it must be recognized that this memorandum was executed after formal recognition and since then exclusive recognition has been granted. Further, the memorandum has no termination date and it would be inconceivable to hold that the Exchange is bound forever to this understanding with respect to dues allotment, and subsequently published agency policies could not apply. See Sec. 12(a) of the Order. cf. IAM Local Lodge 2424 and Aberdeen Proving Ground, Aberdeen, Md., FLRC 70 A-9 (3/9/71).

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headquarters issued this bulletin, which applies to all its facilities, for the purpose of frustrating the bargaining at the Keesler facility. Union counsel also seems to argue that because negotiation of agreements is covered in Section 11 through 15 of the Order, and allotment of dues is covered under the miscellaneous provisions of the Order at Section 21, and because the two subjects are treated separately in the Report and Recommendations on Labor-Management Relations in the Federal Service, August, 1949, allotment of dues is not a subject to be included in negotiation of an agreement but is a matter to be handled in a separate document. Of course, this argument is specious. There is nothing in the Order which prevents the inclusion of a dues allotment clause in a negotiated agreement. 11/ In fact, allotment of dues is a prime subject for negotiations, and affects working conditions of employees as much as other matters normally included in negotiated agreements. (The Order does not make it mandatory for an agency to grant dues allotment.) I cannot, therefore, conclude that the Exchange refused to consult, confer or negotiate in good faith with respect to dues allotment. It at no time refused to grant dues allotment and was merely attempting to incorporate the provision for such in the negotiated agreement pursuant to published agency policy.

In a situation such as this where the Union takes the position that it need not negotiate with respect to dues check-off as it already has a dues check-off agreement, and the Exchange takes the position that it is governed by Exchange Bulletin 58 and any dues check-off must be incorporated in the negotiated agreement, it is not a matter, as indicated above, for the Assistant Secretary under Section 19(a)(6) of the Order. However, the Order does provide a procedure for the resolution of such matters in Section 11(c), including the right of appeal to the Federal Labor Relations Council. In fact, the Assistant Secretary for Labor-Management

11/ The United States Civil Service Commission, with respect to agencies covered by the Federal Personnel Manual, in its FPM Letter No. 711-21, dated 1 March 1971, has recognized that there is no provision in the Executive Order that requires negotiation for dues withholding arrangements be conducted separately from negotiations of other matters.

Relations recently 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." United States Department of Labor, Assistant Secretary of Labor for Labor-Management Relations, Report on a Decision of the Assistant Secretary Pursuant to Section 6 of Executive Order 11491, Report No. 26. Thus, the Assistant Secretary requires that matters such as the impact of Exchange Bulletin 58 on negotiability be processed through the procedure set forth in Section 11(c) of the Order.

To summarize my conclusions with respect to the open items, the Exchange did consult, confer or negotiate in good faith within the meaning of the Order. There is no requirement in the Order that an agency accede to a Union's demands, and in this case the Exchange engaged in "hard bargaining." The Union's problems do not appear to be matters for the Assistant Secretary for Labor-Management Relations. Thus, where a published agency policy governing a proposal is asserted by the Exchange as being controlling, and the Union considers it to be violative of applicable law or disagrees with the assertion that its proposal violates agency regulations, then, especially with regard to the requirements of Exchange Bulletin 58, the Union should follow the procedures set forth in Section 11(c) of the Order including the right of appeal to the Federal Labor Relations Council.

With respect to the open items in which "hard bargaining" on both sides resulted in a negotiation impasse, the Union may avail itself of the service of the Federal Service Impasses Panel provided for in Section 17 of the Order. In fact, the parties provided for utilization of the Impasses Panel in their ground rules for negotiations executed at the first negotiation session.

In view of all the above, I will recommend that the complaint in Case Number 41-1905(CA) be dismissed in its entirety.

B. Case No. 41-2130(CB)

The Exchange's complaint against the Union requires little discussion. With respect to the Union negotiating committee's hostile contempt for the Order and for agency regulations, the

Union's negotiators may have expressed criticism of and displeasure with the Order and pertinent agency regulations but they nonetheless negotiated in good faith. The Union is required to live by the Order and Agency Regulations, but there is no requirement that they love them. Expressions of criticism and hostility do not, standing alone, make out a refusal to consult, confer, or negotiate in good faith. As for lack of authority of the Union's chief negotiator, this allegation is apparently based on indications by him that he would consult with the Union's national president principally with respect to the dues allotment provision. The mere fact that a negotiator checks with his superiors on certain matters in order to assure that he remains within the bounds of his organization's national policy, does not detract from his authority to negotiate an agreement.

In view of the above, I will recommend that Case Number 41-2130(CB) be dismissed in its entirety.

RECOMMENDATIONS

Upon the basis of the foregoing findings and conclusions it is recommended that the Complaint against Respondent, Army and Air Force Exchange Service, Keesler Consolidated Exchange, in Case Number 41-1905 (CA), and the Complaint against Respondent, Local 2670, American Federation of Government Employees, AFL-CIO, in Case Number 41-2130 (CB), be dismissed.

Henry L. Segal

HENRY L. SEGAL
Hearing Examiner

Dated at Washington, D. C.,
JUNE 9, 1971

APPENDIX A

CORRECTIONS IN THE TRANSCRIPT

Page	Line	Appears as	Change to
63	5	copies	copied
190	1	Behrman	Berman
190	2	Concilliation	Conciliation
198	23	for	(delete)
200	18	you	your
201	25	as	and
207	16	porposed	proposed
234	22	ig	if
239	9	are	area
241	9, 14	Behrman	Berman
242	5, 6	Behrman	Berman
256	20	no	not
267	11	girst	first
282	24	chaged	changed
320	8	miliatry	military
320	8	two	to
323	4	less a	lesser
341	9	my	by
341	17	SA	IMSA
342-A	8	sit	sat

Page	Line	Appears as	Change to
9	6, 7	opposing the Federal Employment Order on surface negotiations	(delete)
12	22	metting	meeting
15	22	Bulleting	Bulletin
15	24	Bulletion	Bulletin
21	3	guard	regard
15	1, 2	Textan Wellhouse and Company versus the NLRB	Tex Tan Welhausen Co. v NLRB

Two exhibits of the Exchange were received as Activity Ex. 9. Accordingly certain exhibits are renumbered as follows:

AR 60-21/AF 147-15, Exchange Service Personnel Policies, 6 March 1969, received on p. 308 as exhibit A-9 is renumbered to A-11

C.1, AR 60-21/AF 147-15, Exchange Service Personnel Policies, 14 May 1969, received on p. 308 as exhibit A-9a is renumbered to A-11a.

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

DEPARTMENT OF THE INTERIOR,
UNITED STATES PARK POLICE,
NATIONAL CAPITAL PARKS
A/SLMR No. 145

The subject case involved a petition filed by the Policemen's Association of the District of Columbia seeking a unit of all United States park police in the National Capital Park System. However, also assigned solely to the National Capital Park System were employees classified as guards, rangers, and technicians. While the Activity was agreeable to the Petitioner's requested unit, it also had no objection to a unit including the National Capital Park System's guards, rangers, and technicians, along with the United States park police.

The Assistant Secretary found that a unit composed solely of United States park police was an appropriate unit for the purpose of exclusive recognition. In reaching this determination, he noted that the park police were under special legislation of the United States Congress with regard to all working conditions; for example, promotion, grade classes, pay scale, discipline, sick and annual leave, and retirement provisions; unlike the National Capital Park System's guards, rangers, and technicians who were governed by Civil Service regulations in this regard, and that there was limited contact between the park police and the guards, rangers, and technicians. In addition, the Assistant Secretary noted that although the law enforcement function was common to park police, guards, rangers, and technicians in varying degrees, this was the limited extent of their community of interest for representation purposes. Park police were full-time law enforcement officers, with special qualifications for hiring and in-service training established solely for perfection of this job. The guards, rangers, and technicians perform law enforcement duties on a lesser scale, and in addition to performing a variety of other duties.

In these circumstances, the Assistant Secretary found that the United States park police had a separate and distinct community of interest, and directed an election in the requested unit.

A/SLMR No. 145

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE INTERIOR,
UNITED STATES PARK POLICE,
NATIONAL CAPITAL PARKS

Activity

and Case No. 22-2640 (RO)

POLICEMEN'S ASSOCIATION OF
THE DISTRICT OF COLUMBIA

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Leo A. Glunk. 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 Petitioner's brief, the Assistant Secretary finds:

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

2. The Petitioner, Policemen's Association of the District of Columbia, seeks an election in a unit of all United States park police in the Metropolitan D. C. area, excluding all employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, management officials, and supervisors as defined in the Executive Order. 1/

1/ Although the petition, as filed, specifically defined the claimed unit as "All United States Park Police in the Metropolitan D. C. area" (emphasis supplied), the record is clear that both the Petitioner and the Activity considered the unit boundary description as that designated by the National Park Service's term "National Capital Park System." Therefore, my determination in this case conforms to a requested unit so described.

The Activity is agreeable to the Petitioner's requested unit limited to the National Capital Park System's park police. However, also assigned solely to the National Capital Park System are National Park Service guards. In addition, some Park Service rangers and technicians are employed, to a limited extent, within this area although they are essentially utilized in Park Service regions throughout the remainder of the United States. The Activity indicated no objection to a representational unit which would include the National Capital Park System's guards, rangers, and technicians along with the United States park police. 2/

The Department of the Interior's National Park Service is responsible for the administration of all United States National Parks and Parkways. This assignment is accomplished by designated regions throughout the country. The National Capital Park System is a unique entity within the National Park Service in that it is an amalgamation of a central office, and a cluster of parks and parkways within a specified area. It is the largest organizational section of the Park Service and its jurisdiction extends throughout the District of Columbia, and areas of Maryland and Virginia. In all, it includes: National Capital Parks-Central; National Capital Parks-North; National Capital Parks-East; Chesapeake and Ohio Canal; Antietam National Battlefield Site and Cemetery; Catoctin Mountain Park; Baltimore-Washington Parkway; Suitland Parkway; Wolf Trap Farm Park; Prince William Forest Park; and George Washington Memorial Parkway.

The National Capital Park System is headed by a general superintendent who administers certain departments and directs superintendents of the area parks comprising the System as listed above. The United States Park Police Department, consisting of approximately 411 park policemen, is directly responsible to the Department's chief and not to the general superintendent of the Park System. Attached to the Police Department is a guard force of about 27 guards. Their relationship with the Police Department is essentially limited, however, to a single aspect, i.e. - they are under the overall direction of a park police sergeant. While all United States park police permanently are assigned solely to locations in the National Capital Park System, National Park Service rangers and technicians are almost exclusively assigned to other regional divisions of the Service and are directed by personnel in those regions.

United States park policemen are engaged, full-time, in law enforcement duties. These duties include such activities as the prevention and suppression of criminal activity, the apprehension of criminals, the preservation of peace and regulation of conduct, the protection of life,

2/ There is some record evidence that the Petitioner, in accordance with its own internal rules and regulations, could not accept for full membership personnel other than District of Columbia policemen, United States park policemen, and employees of the Executive Protective Service. Because of my disposition below, I find it unnecessary to consider this aspect of the proceeding.

property, and civil rights in general, and the overall provision of public aid and information. Accomplishment of these activities is through patrolling and observing; controlling public gatherings; performing varied field services; answering emergency calls; disposing of complaints; conducting investigations; preserving evidence; arresting offenders; writing reports; and testifying in court. Park police also exercise concurrent jurisdiction with the District of Columbia Metropolitan Police within the District of Columbia. Whether on or off duty, they carry side arms.

In contrast to a park policeman, a National Park System guard is, according to his job description, "responsible for the protection of United States property from such hazards as fire, theft, vandalism, accidents, trespass and to maintain law and order at the National Monument and/or Memorial to which assigned. Included in this coverage is or will be the Lincoln Memorial, Jefferson Memorial, Theodore Roosevelt Island Memorial and Ford's Theatre, Brentwood Maintenance, Douglass Home, Custis Lee Mansion, Carter Barron Amphitheatre, and the Kennedy Center for the Cultural Arts, and others that may be assigned." (Emphasis supplied.) As opposed to park police, guards have no official arrest authority other than the usual limited citizen's arrest power common to all United States citizens. Their responsibility in carrying out property protection, and law and order maintenance where individual violators are involved is strictly limited to attempted detention of the suspect or suspects while awaiting called upon assistance from the United States park police for investigation and possible official arrest by the park police. Park System guards are only equipped, under unusual circumstances, with side arms.

National Park Service rangers, as noted above, work almost exclusively in nationwide regions other than the National Capital Park System. Their duties require them to plan, develop, advise on, recommend, perform, and supervise programs or activities to meet existing and future needs for one or more park areas or parks, for a region of the United States, or for an entire park system. Park programs and activities include law enforcement, resources management, recreation, interpretation, accident prevention, concessions management, land use planning, structural restoration, fire control, and others. Park ranger law enforcement responsibilities are normally restricted to enforcing Park Service regulations and state fish and game laws within an assigned area. In some circumstances, however, local police authorities do invest rangers with the power to enforce all state laws. Thus, as may be required by their location and authorization, park rangers may make use of side arms.

The job functions of the National Park Service technicians scattered throughout the nation are, in many respects, similar to those of park rangers. Despite such similarities, overall, technicians tend to work under more isolated conditions and perform more detailed functions. While their major duties are listed under the five categories of: (1) law enforcement; (2) resource management; (3) public safety; (4) public use and public relations; and (5) cooperative agencies, each category encompasses specific

kinds of routine tasks. For example, law enforcement essentially refers to patrols, at certain intervals, of park roads and boundaries, traffic direction at points of concentrated use, investigation of visitor accidents, and general enforcement of National Park Service regulations and policies.3/ As to the other categories, technicians are charged in appropriate circumstances with fish stocking programs, maintenance of weather stations, organization of search and rescue operations for lost visitors, collection of fees, and establishment of strong relationships with all local and state law enforcement agencies, as well as with local game, forestry, fire, and rescue officials. As in the case of park rangers, park technicians' possession of law enforcement authority and side arms is dictated by their specific location and authorization.

With respect to the working conditions of these four groups of employees, apart from their job functions reiterated above, there is a clear differentiation between the United States park police and Park Service guards, rangers, and technicians irrespective of their actual working location. Park police are not governed, in any way, by Civil Service regulations. Their job perquisites have been separately legislated by the United States Congress, and are essentially comparable to those applicable to the District of Columbia Metropolitan Police Department and the Executive Protective Service. Special hiring and in-service training qualifications must be met, and examinations are required for promotion. Park police are graded by classes and paid according to a specifically legislated pay scale. Disciplinary procedures are solely the province of the Park Police Department. Sick and annual leave, compensation for on-the-job injury, and retirement are covered by special Acts.

On the other hand, guards, rangers, and technicians are regulated by Civil Service procedures in every respect. Hiring, job classifications, pay, promotion, discipline, firing, sick and annual leave, and retirement apply as with all Federal General Schedule employees. Park police engage in a limited amount of ranger and technician training to help them with certain kinds of law enforcement problems, but that is essentially the total extent of contact between these employee groups.

Of the one or two rangers and technicians assigned within the National Capital Park System, it appears that these assignments are, in some cases, temporary and that, in any event, the rangers and technicians are carrying on duties comparable to those of all other rangers and technicians which are regulated by Civil Service procedures. Specifically, the record is clear that one park ranger is currently working in Prince William Forest Park, a location which does entail a considerable amount of law enforcement duties, and one park technician is at Ford's Theatre, Washington, D.C., where his principal job function is in the area of public use and public relations.

3/ United States park police are fully empowered to handle any infraction of the law occurring within the National Capital Park System. However, in all other Park Service regions of the United States, while minor crimes may be handled by park rangers and technicians (depending upon the extent of their enforcement delegation) the Federal Bureau of Investigation must be called in to handle all serious crimes.

However, at no time does either employee fall within the official jurisdiction of the United States Park Police Department.

In summary, while the single function of law enforcement is common to park police, guards, rangers, and technicians - but in varying degrees - I find that this is the limited extent of their community of interest for representation purposes. Commonality between these employees in terms of other job duties and working conditions ceases at this point except that park police and guards are assigned to the same general locality. Under these facts, I find that United States park police share a community of interest separate and distinct from other employees of the National Capital Park System and that a unit limited to the park police would be appropriate.

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

> All United States park police in the National Capital Park System, excluding all employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, 4/ management officials, employees classified as 'guards' and supervisors as defined in the Executive Order. 5/

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 45 days from the date below. The appropriate Area Administrator shall supervise the election subject to the Assistant Secretary's regulations. Eligible to vote are all 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 furlough, including those in the military service who appear

4/ Because the unit found appropriate is limited to park police, the issue raised at the hearing as to whether park police, rangers, and technicians are "professionals" is rendered moot.

5/ The parties stipulated park police sergeants to be supervisors, and there is nothing in the record to indicate otherwise.

in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated 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 Policemen's Association of the District of Columbia.

Dated, Washington, D. C.
March 29, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

March 29, 1972

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

GENERAL SERVICES ADMINISTRATION,
REGION 10, INTERAGENCY MOTOR POOL
NO. 2 PORTLAND, OREGON
A/SLMR No. 146

This case involves a representation petition filed by District Lodge #17, International Association of Machinists and Aerospace Workers, AFL-CIO (IAM) for a unit of Wage Board mechanics and servicemen of the General Services Administration's (GSA) Region 10, motor pool, located in Portland, Oregon. The GSA maintained that the employees being sought are covered by an existing negotiated agreement and that, therefore, the petition was untimely filed. Further, the GSA contended that the unit was not appropriate as it would fragment established area wide employee representation and would not promote effective dealings and efficiency of operations.

The record revealed that in May 1966, a one-year agreement was signed by Local 122, National Association of Post Office and General Services Maintenance Employees (POGS) and the GSA covering all General Services Administration employees in the Portland area. The agreement contained an annual automatic renewal clause. The record further established that Local 122, POGS and its national organization merged into American Postal Workers Union, AFL-CIO, (APWU) in August 1971.

Until February 7, 1971, the Portland motor pool employees including the Wage Board employees in the requested unit and the General Schedule office employees of the motor pool, who were not requested by the IAM, were employed by the Bonneville Power Administration (BPA) Department of Interior, where they were engaged in the operation of the motor pool. The Wage Board employees were part of a broader bargaining unit covered by negotiated agreements between BPA and the Columbia Power Trades Council, a multi-union bargaining group consisting of 15 labor organizations, including the IAM.

The record revealed that at the time exclusive recognition was granted by the Activity to POGS and a negotiated agreement executed, the Activity employed no motor pool employees in the Portland, Oregon area. Further, the record revealed that neither POGS nor APWU made any attempt to represent the employees of the motor pool after the transfer to GSA control. Under these circumstances, the Assistant Secretary concluded that the motor pool employees including the General Schedule office employees of the motor pool, who he found shared a community of interest with the garage employees, constituted an appropriate residual unit of GSA employees in the Portland area. In addition the Assistant Secretary found that GSA had not established that the residual unit found appropriate would not promote effective dealings and efficiency of agency operations.

The Assistant Secretary also made findings with respect to the eligibility status of certain alleged supervisors and temporary employees in the unit, and as the unit differed from the unit originally sought by the IAM, he ordered a posting of a Notice of Unit Determination in order to ascertain the existence of any additional intervenors in the unit found appropriate.

A/SLMR No. 146

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,
REGION 10, INTERAGENCY MOTOR POOL NO. 2
PORTLAND, OREGON 1/

Activity

and

Case No. 71-1871(25)

DISTRICT LODGE #17, INTERNATIONAL
ASSOCIATION OF MACHINISTS and
AEROSPACE WORKERS, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Pursuant to a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Dale L. Bennett. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 2/

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

2/ At the commencement of the hearing in this matter, representatives of the Portland, Oregon local of the American Postal Workers Union, AFL-CIO, herein called APWU, attempted to intervene in the proceedings on the basis of a negotiated agreement which allegedly encompassed the employees in the petitioned for unit. The Hearing Officer denied the attempt to intervene based on the APWU's failure to comply with the requirements of Section 202.5(c) of the Assistant Secretary's Regulations regarding intervention. The ruling of the Hearing Officer is hereby affirmed. As I stated in Report on a Decision of the Assistant Secretary, Report No. 43, an incumbent labor organization, like any other intervenor, must file, under Section 202.5(c) of the Regulations, a notice of intervention within 10 days after the initial date of posting of the notice of petition, and any such intervention filed thereafter, in the absence of good cause shown for extending the period, will be considered untimely.

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

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

2. The Petitioner, District Lodge #17, International Association of Machinists and Aerospace Workers, AFL-CIO, herein called IAM, seeks an election in a unit of all auto mechanics and auto servicemen employed by the General Services Administration in Portland, Oregon, excluding management officials, supervisors, guards, office clerical employees and professional employees. The Activity asserts that the employees being sought are covered by a negotiated agreement initially entered into by the Activity and the predecessor of the APWU, Local 122, National Association of Post Office and General Services Maintenance Employees, herein called POGS. In this connection, the Activity asserts that because that agreement contained an automatic renewal clause, it was in existence at the time of the filing of the IAM's petition herein and it, therefore, rendered such petition untimely. 3/ Further, the Activity contends that the unit sought is not appropriate as it would fragment established area wide employee representation and would not promote effective dealings and efficiency of operations.

A. The Unit Question

The evidence establishes that Local 122, POGS was accorded exclusive recognition by the Activity in 1963 and that the parties executed a one-year agreement on May 18, 1966, covering all eligible employees of the GSA in the Portland area. The agreement contained an annual automatic renewal clause and has continued in effect to the present date. In August 1971, the national organization of the POGS was merged into the APWU.

Region 10 of the General Services Administration (GSA), which encompasses 5 northwestern states, provides five program services to Federal agencies. 4/ It is headquartered in Auburn, Washing-

3/ The Activity moved to dismiss the IAM's petition on the ground that the APWU was not properly notified by the IAM of the latter's petition which resulted in the APWU's untimely intervention request. However, the record reveals that there was a posting of a notice of the IAM's petition pursuant to Section 202.4(b) of the Assistant Secretary's Regulations and that the APWU was, in fact, aware of the filing of such petition and had ample opportunity to intervene properly in this proceeding. Accordingly, the Activity's motion is hereby denied.

4/ These services include Public Buildings Service (PBS), Federal Supply Service (FSS), Property and Management Disposal (PMD), National Archives and Records (NAR), and Transportation and Communication Service (TCS).

ton and is under the direction of a Regional Administrator. Each program is headed by a Regional Director, who is responsible for the general direction and supervision of all Regional employees within his program. The TCS is comprised of 3 divisions; the communications division, which provides telephone and teletype services for the Region; the transportation management division, which sets freight rates and manages the routing of freight and personnel; and the motor equipment division, which includes, among other sections, an equipment operations section, headed by a chief of operations. The equipment operations section is comprised of 9 major motor pools, including the motor pool in Portland, and several sub-pools.

The record reveals that until February 7, 1971, the Portland motor pool was operated by the Bonneville Power Administration (BPA), U.S. Department of Interior, Portland, Oregon. 5/ From May 2, 1945 until February 7, 1971, the Wage Board auto mechanics and servicemen in the BPA motor pool, were part of a broader bargaining unit covered by a series of negotiated agreements between the BPA and the Columbia Power Trades Council, a multi-union bargaining group consisting of fifteen labor organizations, including the IAM and International Brotherhood of Teamsters (IBT). 6/ Under these agreements, auto mechanics in the BPA motor pool were represented by the IAM and auto servicemen were represented by the IBT. On February 7, 1971, the responsibility for the operation of the Portland motor pool, which included some 7 General Schedule and 11 Wage Board employees, was transferred from the BPA to the GSA. 7/

The GSA Portland motor pool is located at the same facility in which it operated when the BPA directed the pool. It currently consists of separate garage and office areas, both under the general

5/ The record reveals that the BPA operation was the only motor pool in the Federal Government not operated by GSA.

6/ The General Schedule employees in the BPA motor pool were excluded from the Columbia Power Trades Council unit.

7/ The IAM contends, in this regard, that because the GSA is a "successor agency" it is bound to recognize the IAM as the exclusive representative of the motor pool employees. The IAM testified that the IBT had agreed to give it full jurisdiction in the representation of Portland motor pool employees. In my view, a representation proceeding is not the proper forum to raise an issue concerning whether an agency or Activity is improperly refusing to accord appropriate recognition. Accordingly, I find it unnecessary to pass upon the IAM's contention in this respect.

direction of the motor pool manager. The garage area is comprised of a service area and a body shop. In the service area, auto mechanics perform various service duties on GSA vehicles such as gassing and lubricating vehicles, changing and repairing tires, mufflers, tail pipes and other vehicular equipment, washing cars and performing some light repair work. In the body shop, approximately 4 automotive mechanic inspectors are involved in the diagnosis of mechanical problems and in performing preventive maintenance or any necessary repairs for the maintenance of the motor pool fleet. The office employees of the motor pool consist of an account technician, a dispatcher, and office clerks, all of whom are General Schedule employees, and a garage attendant, who is presently assisting in the office. They are located in basement offices near the garage area where they engage in various functions related to the operation of the motor pool. The evidence establishes that these office employees share a clear and identifiable community of interest with the garage employees in that all are engaged in the common mission of operating the motor pool, are located in the same general area, and share common overall supervision.

As previously indicated, the Activity contends that the claimed motor pool employees are included in an existing exclusively recognized unit covered by a negotiated agreement originally entered into by the POGS, the predecessor of the APWU, and the Activity, and that, therefore, the IAM petition was filed untimely and must be dismissed. In this connection, the record reveals that at the time exclusive recognition was granted by the Activity to the POGS and negotiated agreement was executed, the Activity employed no motor pool employees in the Portland, Oregon area.

An Activity employee, who, at the date of the hearing, was a representative of the APWU and who was a POGS official at the time of the transfer of the Portland motor pool to GSA, testified that since the transfer on February 7, 1971, neither the POGS nor the APWU represented the motor pool employees in any manner and stated that, in his view, the APWU did not represent the Portland motor pool employees. In this connection, there is no evidence that prior to the filing of the IAM's petition either the POGS or the APWU ever indicated to the Activity or to the employees in the motor pool that the latter were considered to be included in the existing Portland area unit. In these circumstances, I find that the motor pool employees who were transferred from BPA to the GSA did not constitute an addition or accretion to the existing exclusively recognized unit and, therefore, were not covered by any negotiated agreement. Accordingly, I find that the IAM's petition was filed timely as it was not barred by an existing negotiated agreement. 8/

8/ In this regard, I hereby deny the Activity's motion made at the hearing to dismiss the petition as untimely filed.

The Activity contends that the unit sought is not appropriate because its establishment would fragment established area wide employee representation and it would not promote effective dealings and efficiency of operations. The Activity asserted, in support of its position, that fragmentation of units along service lines or specialized functions could result in the establishment of numerous small units within Region 10, which would hinder severely the GSA in accomplishing its mission. It asserted further, that because the Region's organizational structure provides centralized personnel services and supervision, and employees perform interdependent functions, effective dealings and efficiency of GSA operations would be frustrated by granting the unit sought by the IAM. While I agree generally with the Activity's position concerning fragmented bargaining units as it relates to the unit sought by the IAM, it should be noted that, as found above, there is a clear and identifiable community of interest between the office employees of the motor pool and the employees in the garage area. In addition, it should be noted that these employees combined constitute the only unrepresented group of the Activity. Under these circumstances, I find that a unit of all motor pool employees constitutes an appropriate residual unit of the Activity in the Portland, Oregon area.

In my view, the contentions of fragmentation have not been supported by sufficient evidence to warrant the finding that the residual unit found appropriate would not promote effective dealings and efficiency of agency operations. 9/ Thus, contrary to the Activity's contentions, the establishment of the residual unit in the instant case will not result necessarily in the establishment of numerous small units within Region 10. Rather, my decision in the subject case, is based on the view that because the employees are not an addition or an accretion to the existing exclusively recognized unit and because they are the only unrepresented group of employees in the Portland area, an election will afford them, consistent with the spirit and purposes of the Order, an opportunity to express their wishes with respect to representation. Moreover, my decision herein would not preclude a finding that in other circumstances a more comprehensive unit, as contended by the GSA, may be appropriate.

B. Eligibility Questions

During the course of the hearing in this matter, questions arose concerning the eligibility of certain employees in the unit found appropriate.

The parties stipulated that the motor pool manager is a supervisor within the meaning of the Executive Order. In this regard, the evidence establishes that the motor pool manager has authority to assign

9/ In this connection, the Federal Labor Relations Council has ruled that evidence as to whether a requested unit will promote effective dealings and efficiency of agency operations is within the special knowledge of and must be submitted by the agency involved. See Department of the Navy, Alameda Naval Air Station, A/SLMR No. 6, FLRC 71A-9.

work, to discipline effectively, to evaluate performance records and to make recommendations for promotions. In these circumstances, I find that the motor pool manager is a supervisor within the meaning of Section 2(c) of the Order and should be excluded from the unit found appropriate. 10/

The automotive mechanic leader makes the daily work assignments in the garage. An employee in this classification earns substantially more per hour than any other garage employee; performs no manual labor in connection with his duties; attends meetings on production with the pool manager; and makes decisions on his own regarding the subcontracting out of repair work. The record shows also that the automotive mechanic leader is regarded as a supervisor by the other employees in the garage, assigns work and directs all employees in the garage, and has, on occasion, disciplined employees and resolved grievances. In these circumstances, I find that the automotive mechanic leader is a supervisor within the meaning of Section 2(c) of the Executive Order and, therefore, should be excluded from the unit found appropriate.

The record reveals that after the transfer of the Portland motor pool to the GSA, an automotive mechanic inspector was appointed to understudy and assist the automotive mechanic leader. While it was asserted that this employee has authority to act for the automotive mechanic leader in the latter's absence, there is no evidence of any instance since February, 1971, when the automotive mechanic leader has been absent. Moreover, the record indicates that the assistant to the automotive mechanic leader works with his tools. In these circumstances, I find that the assistant to the automotive mechanic leader is not a supervisor within the meaning of the Order and should be included in the unit found appropriate.

With respect to the account technician, an office employee, the evidence reveals that such an employee does not direct the office personnel. Moreover, the account technician does not possess the authority to recommend the hiring of employees, to discipline, to recommend for promotion, or to evaluate employees. In these circumstances, I find that an employee in this job classification is not a supervisor within the meaning of the Order and should be included in the unit found appropriate.

The record indicates that since July 1971, two student aides have been employed as "temporary" employees in the motor pool as assistants to the mechanics and servicemen. Their duties include

10/ While the parties also stipulated that the assistant pool manager was a supervisor, the stipulation was not supported by facts. Accordingly, I find the record insufficient to make a ruling on the supervisory status of this employee.

washing cars, sweeping floors and changing tires. During the summer months, the employees worked a regular 40 hour work week, which has been reduced to a regular 16 hour basis during the school year. They receive annual and sick leave but do not participate in the Federal retirement plan. Testimony indicated further that the student aides may be converted to full time status next summer if budget allowances permit. As the two student aides have been working on a regular part time basis, and have a reasonable expectancy of continuing employment on this basis, I shall include them in the unit found appropriate. 11/

Based on the foregoing, I find that the following employees of the Activity constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491:

> All General Schedule and Wage Board employees of the General Services Administration, Region 10, Interagency Motor Pool No. 2 in Portland, Oregon, including the assistant to the automotive mechanic leader, the account technician and student aides, but excluding the motor pool manager, automotive mechanic leader, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order. 12/

DIRECTION OF ELECTION

In the circumstances set forth below, an election by secret ballot shall be conducted among the employees in the unit found appropriate, not later than 45 days from the date upon which the appropriate Area Administrator issues his determination with respect to any interventions in this matter. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by District Lodge #17, International Association of Machinists and Aerospace Workers, AFL-CIO, or by any other labor organization which, as discussed below, intervenes in this proceeding on a timely basis, or by no union, or by neither if another labor organization intervenes.

Inasmuch as the unit found appropriate is substantially different from that which was petitioned for, I direct that the Activity post copies of a Notice of Unit Determination, as soon as possible, in places where notices are normally posted affecting employees eligible to vote in the unit set forth herein. 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 other labor organization which may seek to intervene in this matter must do so in accordance with the requirements of Section 202.5 of the Assistant Secretary's Regulations. Any intervention, otherwise timely, will be granted solely for the purpose of appearing on the ballot in the election among all the employees in the unit found appropriate.

Dated, Washington, D.C.
March 29, 1972

W.J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

11/ Cf. U.S. Department of Agriculture, Regional Forester Office, Forest Services, Region 3, Santa Fe National Forest, Santa Fe, New Mexico, A/SLMR No. 88 and U.S. Department of Agriculture, Forest Service, Schenck Civilian Conservation Center, North Carolina, A/SLMR No. 116.

12/ Because the unit found appropriate is larger than the unit the IAM sought initially, I shall permit it to withdraw its petition upon notice to the appropriate Area Administrator within 10 days of the issuance of this Decision.

April 25, 1972

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

CALIFORNIA AIR NATIONAL GUARD
HEADQUARTERS, 146th TACTICAL AIRLIFT
WING, VAN NUYS, CALIFORNIA
A/SLMR No. 147

The Petitioner, National Association of Government Employees (NAGE), sought an election in a unit of General Schedule and Wage Board air technicians of the 146th Tactical Airlift Wing at Van Nuys, California (Activity). Also located at Van Nuys are two tenant squadrons composed of air technicians, the 147th Mobile Communications Squadron and the 261st Mobile Command Squadron.

The evidence adduced at the hearing concerned primarily the guard functions performed by the air technicians in the proposed unit. Noting that guard duty was performed by employees in the claimed unit only once every 60-70 days, or some 48 hours a year; that when acting as guards the air technicians did not issue traffic tickets or reports; wore no special uniform or identification; continued to report to their regular supervisors; received no formal guard training; could only make limited citizens' arrests; and that such work was not a substantial segment of the air technician's job, the Assistant Secretary concluded that the air technicians in the claimed unit were not guards within the meaning of the Order.

With respect to the appropriateness of the unit sought by the NAGE, the Assistant Secretary found that insufficient evidence had been adduced at the hearing to determine whether the unit sought was appropriate. Thus, there was no evidence in the record regarding the description, location or functions of other Air National Guard units in California or their possible relationship to the Activity. Nor was there sufficient information in the record to show whether the Activity's air technicians shared a clear and identifiable community of interest separate and distinct from the interests of the employees of the tenant squadrons at Van Nuys or other unrepresented Air National Guard employees, if any, located at other bases throughout California.

In view of the foregoing, the Assistant Secretary ordered that the case be remanded to the appropriate Regional Administrator for the purpose of reopening the record to obtain additional facts in accordance with his decision.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

CALIFORNIA AIR NATIONAL GUARD
HEADQUARTERS, 146th TACTICAL
AIRLIFT WING, VAN NUYS,
CALIFORNIA 1/

Activity

and

Case No. 72-RO-2829(25)

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES

Petitioner

DECISION AND REMAND

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Albert C. Potter. 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 Petitioner's brief, the Assistant Secretary finds:

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

2. The Petitioner, National Association of Government Employees, herein called NAGE, seeks an election of all nonsupervisory civilian technicians of the 146th Tactical Airlift Wing of

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

the California Air National Guard employed at the Van Nuys Air National Guard Base, Van Nuys, California.

In addition to the Activity, two tenant squadrons, the 147th Mobile Communications Squadron and the 261st Mobile Command Squadron, herein called the 147th and 261st respectively, are located at the Base. The Activity's primary mission is that of tactical airlift; while the 147th and 261st are engaged primarily in communications.

The Activity agreed with the NAGE with respect to the appropriateness of the proposed unit. However, an issue was raised as to whether the air technicians in the proposed unit are "guards" within the meaning of Section 2(d) of the Executive Order.

The record reveals that because of the size of the Van Nuys Base and the lack of fencing or other physical security features, most of the air technician employees of the Activity and of the 147th and 261st on occasion are required to perform guard duty during off duty hours (4:00 p.m. to 7:45 a.m.) to protect the exposed flight line. 2/ In this connection, the guard duty performed by these technicians occurs approximately once every 60 to 70 days, or for approximately 48 hours a year. The record shows that in performing this duty, the air technicians are issued no special uniforms or means of identification; receive no special guard training; have no power to arrest, other than limited citizens' arrest powers; do not issue traffic tickets or write guard reports; and they continue to report to their regular supervisors. Moreover, the limited guard duty performed clearly is subordinate to their regular duties and responsibilities.

In these circumstances, I find that the occasional and sporadic performance of certain limited protective services by the air technicians in the claimed unit does not render them

2/ The record reveals that one Security Police Technician is employed on a full-time basis by the Activity. In addition, there is one Aircraft Mechanic who acts as a permanent substitute for the Security Police Technician. In agreement with the parties, and as the record reveals that both of the above mentioned employees perform guard functions in the regular course of their employment, during all, or a substantial part, of their working time, I find that they are guards within the meaning of the Order.

"guards" as defined in Section 2(d) of the Order. 3/

As the hearing herein was devoted primarily to the status of the air technicians with regard to their "guard" functions, the record contains limited facts pertaining to the appropriateness of the petitioned for unit. 4/ In this connection, the record does not reflect the interrelationship of the Activity and its tenant organizations; the description, location or function of other Air National Guard units in the State of California; and whether or not there are other unrepresented California Air National Guard units at the Base involved herein or within the State.

Although the record indicates that the California Air National Guard is under a Commanding General located in Sacramento, California, it is not clear whether the responsibility for promotions, discipline, suspension, discharge, grievance adjustment or the authority to enter into negotiated agreements has been retained by the Commanding General, or whether such authority has been delegated to the local Base commander. Further, there is no evidence as to how these responsibilities are exercised at the various organizational levels. Nor does the record disclose how the responsibilities and duties of the technicians in the 147th and 261st differ from similarly classified employees in the petitioned for unit. Moreover, while it appears that the 147th and 261st receive their command directions from the 162nd Mobile Communications Group in North Highlands, California, and the Activity performs all of their housekeeping functions, the record is unclear at what level of the air command structure personnel decisions regarding hiring, firing and promotions for the 147th and 261st are made or effectuated. Also, while there is some evidence of job transfers between the 147th and 261st and the Activity, the record does not reflect whether there is employee interchange between the Activity and these units, or what is the relationship of employees in such units with employees in the claimed

3/ Cf. United States Department of the Air Force, 910th Tactical Support Group, (AFRES), A/SLMR No. 12, in which I concluded that firefighters who performed certain limited security functions, constituting approximately 8 percent of the time worked per month, were not "guards" within the meaning of the Order.

4/ Although the NAGE and the Activity agreed that 85 of the some 268 employees in the petitioned for unit were supervisors, guards, or employees engaged in Federal personnel work who should be excluded from the unit, the record does not contain sufficient facts to enable me to make any finding with respect to the status and eligibility of these employees.

unit.

In view of the deficiencies in the evidence noted above, I find that the record contains insufficient facts upon which a decision concerning the appropriateness of the claimed unit can be made.

Accordingly, I shall remand the subject case to the appropriate Regional Administrator for the purpose of reopening the record to obtain the additional facts discussed herein.

ORDER

IT IS HEREBY ORDERED that the subject case be, and it hereby is, remanded to the appropriate Regional Administrator.

Dated, Washington, D.C.
April 25, 1972

W.J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

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

U. S. ARMY SCHOOL/TRAINING CENTER,
FORT GORDON, GEORGIA
A/SLMR No. 148

This unfair labor practice proceeding involved an alleged Section 19(a)(6) violation of the Executive Order by the Respondent when it changed the meal period length for certain unit employees exclusively represented by Local Lodge 2617, American Federation of Government Employees, AFL-CIO, (AFGE) from 30 minutes to one hour which AFGE contends was in direct conflict with certain provisions of the parties' negotiated agreement.

The Respondent defended its admitted change in the meal period length on two grounds. First, under certain specified terms of the parties' agreement, it was not required to "negotiate" with the Union over such a change, but its only agreed-to-obligation was to "consult" with the Union, and, second, the consultation obligation was, in fact, fulfilled.

In general agreement with the Respondent's defense, the Hearing Examiner recommended dismissal of the complaint.

The Assistant Secretary adopted the Hearing Examiner's Report and Recommendations noting his agreement with the Hearing Examiner's finding that the advisory arbitration award involved in the proceeding was not dispositive of the issues herein, particularly where, as here, neither party claimed that the arbitrator's determination was or should be controlling. However, the Assistant Secretary also stated that his decision herein was based solely on the fact that the parties' negotiated agreement, on its face, called for consultation by the Respondent with the Union as to "any contemplated changes in the regularly scheduled workday or workweek" prior to implementation; and that the Respondent fulfilled this agreement requirement when it decided to change the meal period length after three separate meetings with the Union in which the lunch period change was discussed.

Accordingly, the complaint was dismissed.

A/SLMR No. 148

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. ARMY SCHOOL/TRAINING CENTER,
FORT GORDON, GEORGIA

Respondent

and Case No. 40-2596 (CA)

LOCAL LODGE 2017, AMERICAN
FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Complainant

DECISION AND ORDER

On July 22, 1971, Hearing Examiner Frank H. Itkin issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent, U. S. Army School/Training Center, Fort Gordon, Georgia, 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, Local Lodge 2017, American Federation of Government Employees, AFL-CIO, 1/ filed exceptions to the Hearing Examiner's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Hearing Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Hearing Examiner's Report and Recommendations and the entire record in this case, including the exceptions, I hereby adopt the findings, 2/ conclusions, 3/ and recommendations of the Hearing Examiner.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 40-2596 (CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
April 25, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

1/ Herein referred to as the Union.

2/ Although an arbitrator's advisory decision on this matter was issued on March 1, 1971, prior to the unfair labor practice hearing, the parties did not claim that his determination was or should be controlling. In agreement with the Hearing Examiner, and based on the findings expressed in footnotes 2 and 11 (p. 16) of his Report and Recommendations, I have determined the issues raised herein, notwithstanding the advisory award.

3/ In reaching the disposition herein, I have relied solely on the fact that the parties' negotiated agreement, on its face, calls for consultation by the Respondent with the Union as to "any contemplated change in the regularly scheduled workday or workweek" prior to implementation (Article X, Section 2); and that the evidence establishes that the Respondent fulfilled this agreement requirement when it decided to change the meal period length during certain unit employees' regularly scheduled workday from 30 minutes to one hour through joint meetings held on December 18, and 23, 1969, and on January 16, 1970. I specifically do not adopt the Hearing Examiner's rationale that "the modification made here in the lunch period was incidental to and required by a change in the unit employees' scheduled tour of duty," and that to require "full scale bargaining over the incidental and related meal period change would create an incongruous situation." /Emphasis supplied./

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. ARMY SCHOOL/TRAINING CENTER
FORT GORDON, GEORGIA

Respondent

and

CASE NO. 40-2596 (CA)

LOCAL LODGE 2017, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

Complainant

Albert C. Ruehmann, III, Captain, Staff Judge Advocates Office, Fort Gordon, Georgia, for the Respondent.
Bobby L. Harnage, Esquire, 222 Scott Circle, Warren-Robins, Georgia, 31093, for the Complainant.

Before: Frank H. Itkin, Hearing Examiner

REPORT AND RECOMMENDATIONS

Statement of the Case

This proceeding arises under Executive Order 11491. It was initiated by a complaint filed on December 10, 1970, by Local Lodge 2017, American Federation of Government Employees, AFL-CIO (herein, "the Union"), alleging that respondent U. S. Army School/Training Center, Fort Gordon, Georgia (herein, "the Army"), violated Section 19(a)(6) of the Executive Order by unilaterally changing the established meal periods for certain unit employees from 30 to 60 minutes. A notice of hearing on the complaint was issued on February 22, 1971, by the Atlanta Regional Administrator of Labor-Management Services Administration, United States Department of Labor.

The hearing was conducted before me on June 8, 1971, at Augusta, Georgia. Both parties were represented by counsel who were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, submit oral argument and file briefs. Upon the entire record in this matter, from observation of the witnesses and after due consideration of the briefs filed by the parties,1/ I make the following findings and conclusions:

Findings of Fact

I. Introduction; the contentions of the parties

The Army and the Union are parties to a basic agreement covering "all eligible rank and file employees" at the Army's Fort Gordon facility. The agreement recites, inter alia, that "All work periods will provide for normal meal periods of 30 minutes duration scheduled outside the hours established for the daily tour of duty...". The Union contends that the Army, in modifying the established meal periods for certain unit employees from 30 to 60 minutes, violated Section 19(a)(6) of the Executive Order by "refus[ing] to consult, confer, or negotiate with" the Union over the change. The Army principally contends that under the terms of the basic agreement it was not required to negotiate or bargain with the Union over the contemplated change, that its only obligation in this respect was to "consult" with the Union, and that it fulfilled this obligation. The Army also asserts that the change in the meal period was made in accordance with applicable rules and regulations, and was otherwise privileged under the agreement and Sections 11(b) and 12(b) of the Executive Order. 2/

1/ At the request of counsel for both parties at the hearing, the time for filing briefs was extended to July 8, 1971; briefs were filed by both parties.

2/ In its answer to the complaint, the Army alleges, inter alia, that the matter is presently pending before an arbitrator for decision and, therefore, the filing of an unfair labor practice complaint is "out of order." However, as discussed infra, p. 16, n.11, the arbitrator's advisory decision has issued and the parties do not claim that his determination is or should be controlling here.

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II. The relationship of the parties; the basic agreement

The Union and the Army negotiated a basic agreement covering "all eligible rank and file employees" at the Army's Fort Gordon facility. The agreement, which became effective on February 19, 1969, has been operative at all times material to this case. Involved in this proceeding are some 365 civilian instructors and 124 administrative instructional personnel, who comprise a part of the overall unit represented by the Union. 3/ The pertinent provisions of the basic agreement are, as follows:

ARTICLE I EXCLUSIVE RECOGNITION AND COVERAGE OF AGREEMENT

Section 1. The Employer hereby recognizes that the Lodge is the exclusive representative of all eligible employees in the unit, as defined in Section 2 below, and the Lodge hereby recognizes the responsibility of representing the interests of all such employees without discrimination and without regard to Union membership, subject to the express limitations set forth in Articles II and IV below.

* * * * *

ARTICLE II GOVERNING CONSIDERATIONS

Section 1. In the administration of matters covered by this Agreement the Employer, the Lodge, and employees are governed by the provisions of any existing or future laws and regulations, including policies set forth in the Federal Personnel Manual and agency regulations, which may be applicable, and the Agreement shall at all times be applied subject to such laws, regulations, and policies.

ARTICLE III MATTERS SUBJECT TO CONSULTATION.

Section 1. It is agreed and understood that matters appropriate for consultation between the parties are policies and practices relating 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, leave promotion plans, demotion practices, pay practices, reduction in force practices, and hours of work. * * *

Section 2. Nothing in this Agreement shall be construed as imposing an obligation upon the Employer to consult or negotiate

3/ The overall unit includes approximately 3,000 civilian employees.

concerning such areas of discretion and policy as the mission of an agency, its budget, the organization and assignment of its personnel or the technology of performing its work.

Section 3. It is further recognized that this Agreement does not alleviate the responsibility of either party to meet with the other to discuss and consult on matters not covered by this Agreement which come within the scope of consultation.

Section 4. It is further agreed and understood that the Employer will consult with the Lodge before making changes of prior benefits, practices and understandings which have been mutually acceptable to the Employer and the Lodge but which are not specifically covered by this Agreement.

ARTICLE IV RIGHTS OF EMPLOYER

Section 1. Management retains the right in accordance with applicable laws and regulations: (1) to direct employees; (2) to hire, promote, transfer, assign, and retain employees and to suspend, demote, discharge or take other disciplinary action against employees; (3) to relieve employees from duties because of lack of work or for other legitimate reasons; (4) to maintain the efficiency of the Government operations entrusted to them; (5) to determine the methods, means and personnel by which such operations are to be conducted; and (6) to take whatever other actions may be necessary to carry out the mission of the Employer in situations of emergency.

* * * * *

ARTICLE VI RIGHTS OF LODGE

Section 1. The Lodge as the exclusive representative of employees of the unit has the right and obligation to represent in good faith the general interests of all such employees without discrimination and without regard to employee organization membership.

Section 2. The Lodge shall have the right to present its views to the Employer, either orally or in writing, and to have such views considered in the formulation, development, and implementation of personnel policies and practices, and matters affecting working conditions, that are at the discretion of the Employer. In addition to the right to present its views, the Lodge has a right to be consulted by management at all levels on matters such as those specified in Article III, Section 1.

Section 3. The Lodge shall be given the opportunity to be represented at 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.

* * * * *

ARTICLE X HOURS OF WORK AND BASIC WORKWEEK

Section 1. The normal basic tour of duty shall consist of five consecutive eight-hour days, Monday through Friday, excluding 30 minutes for meal periods each day. A period of seven consecutive days beginning at 0001 hours on Sunday and ending at 2400 hours the following Saturday constitutes an administrative work week.

Section 2. Any contemplated change in the regularly scheduled workday or workweek shall be in accordance with applicable rules and regulations and the Lodge shall be consulted prior to its implementation.

Section 3. Tours of duty shall cover a minimum of forty (40) hours per administrative workweek for all full-time employees. Wherever possible the basic 40-hour workweek shall be scheduled over five days, Monday through Friday, so that the two days outside the basic workweek shall be consecutive. As a minimum, one regular day off - preferably Sunday - shall be provided.

Section 4. Tours of duty will be established or changed at least two (2) weeks in advance, continued for a period of at least two pay periods, and will be announced in writing. The Commanding General may make exceptions to this requirement when unusual circumstances preclude compliance. Exceptions will not be made, however, when the change in tour is for the purpose of avoiding or creating the necessity for payment of overtime, night differential, Sunday differential, or holiday pay.

* * * * *

Section 8. All work periods will provide for normal meal periods of 30 minutes duration scheduled outside the hours established for the daily tour of duty, except in situations where three 8-hour shifts are in operation and an overlapping of shifts to permit time off for meal periods is not desired by the Employer. In such a situation, a meal period of not more than 20 minutes shall be granted and shall be considered time worked for which compensation is allowed. All paid meal periods must be taken in close proximity to the work.

* * * * *

III. The earlier meal-time and tour-of-duty practices, and the contemplated effect of the basic agreement upon these practices 4/

Prior to February 1967, the Army's Southeastern Signal School at Fort Gordon was operated on a regular 8-hour academic or instructional day, Monday through Friday, with an 80-minute lunch period for civilian personnel. In February 1967, in order to meet increased needs for military personnel, the School's operation was changed to a 3-shift per day training schedule, consisting of approximately a 6 1/2-hour academic day with a 30-minute lunch period for most of the instructors. Some 35 to 40 civilian instructors in one department -- the "officers department" -- were assigned a 60-minute lunch hour.

During the summer of 1968, while the 3-shift operation was in effect, the parties negotiated the basic agreement quoted above. During negotiations, the Union proposed that the agreement specify that the lunch period for civilian employees be 30 minutes. However, Colonel Edward E. Moran, Commandant of the School, objected to the Union's proposal because, as he informed the Union's representatives, "we had previously been [on] a different lunch period; sometime in the future we might change and go back to something similar to that [; and] one of the 5 academic departments * * * [had] continued on a 1-hour lunch period for both military and civilian personnel [and] had never been otherwise since the officer department had been organized in 1961." As a consequence, according to Colonel Moran, the approved basic agreement provided in effect that the "normal" 30-minute lunch periods "may be changed after consultation." In short, Colonel Moran testified, "as changes were indicated by changing workloads and work requirements and instructor staff, we would revise the lunch period." 5/

4/ The facts recited in this section are based upon the essentially unrefuted testimony of Colonel Edward E. Moran, Commandant of the Army's Signal School at Fort Gordon, which testimony I credit.

5/ In its answer to the complaint, the Army argues (p. 2):

* * * * *

> The agreement incorporated the scheduled workday then in existence but contained sufficient language, in the opinion [of its] negotiators, to permit flexibility in changing the scheduled workday should the need for such change arise in the future.

* * * * *

IV. The Army proposes changes in meal period and tour-of-duty practices; the Union's position

As a result of a phasedown in military operations during late 1968 and early 1969, the School's workload was reduced. Consequently, Colonel Moran attempted to revert to a regular 8-hour shift operation which would also necessitate a change in the work schedule and lunch periods for the personnel involved. To this end, he convened meetings in his office with Union representatives on December 18 and December 23, 1969.

In attendance at the December 18 meeting were Colonel Moran; Colonel Joe M. Sanders, Deputy Post Commander; Colonel Moran's civilian aide and his deputy;6/ Phanuel E. Grider, the president of the Union's local; and two other unidentified Union representatives. At the meeting, according to the testimony of Colonel Moran, "We discussed the question of going to an 8-hour, what we call a POI, day or an academic day and going to a 1-hour lunch period." 7/

In attendance at the December 23 meeting were the same Union representatives who had attended the earlier meeting; Colonel Moran; Colonel Moran's deputy; and Colonel Johnson from Center Headquarters. Colonel Sanders was not present at this meeting. According to the credible testimony of Colonel Moran, "we discussed the possibility of securing the agreement of the Lodge representatives to a change in the POI day. We were informing them and seeking their agreement." Colonel Moran further testified that he "asked" the Union representatives "if they had any counter-proposals to the schedule [he] had prepared and presented to these people." In response, as Colonel Moran testified, one of the Union's representatives "offered to provide [him] with a proposal" but this "was never done." At this

6/ The record does not show the names of these persons.

7/ Phanuel E. Grider, who testified on behalf of the Union, could not "recall" attending any meetings in December 1969 concerning the subject of "changing of hours." However, I credit Colonel Moran's testimony with respect to the two meetings. Colonel Moran's testimony, in this respect, was not specifically denied, did not seem contrived, fitted together and was mutually corroborative with other evidence, and upon the entire record considered as a whole, I believe and find his testimony concerning the December meetings more trustworthy than Grider's failure to recall the meetings.

meeting, Colonel Moran stated to Phanuel E. Grider that one of the School's academic departments, the officer's department, was "still" operating "on a 1-hour lunch period in a regular 8-hour POI day." Grider stated that "he was not concerned with that, he was only concerned with the 4 enlisted departments." 8/

Subsequently, on January 16, 1970, a meeting was held in Colonel Sanders' office with respect to the Army's proposed change in the scheduled workday and lunch time. In attendance at this meeting were Phanuel E. Grider; Bobby Harnage, national representative and counsel for the Union; Colonel Sanders; and Colonel Moran. At the meeting, the Army submitted a written "Memorandum of Understanding", wherein the parties would agree to a proposed change in the scheduled workday pending and during negotiations for a new basic agreement. 9/ According to the testimony of Phanuel E. Grider, "the Colonel had discussed a possible desire to change the hours of work and he said he had that memorandum there, that this change could be made if we both signed it * * *." Grider responded that he "did not feel that it was a matter to be handled in that manner at all, but was an item

8/ On cross-examination, Colonel Moran further testified:

> I advised them [the Union representatives] of my problem of academic time. I advised them of my need * * * to cover the classes if and when we did change the academic hours. I provided them with a suggested or a proposed * * * schedule of academic and lunch hours that I was considering. One of the [Union's representatives] objected to it. I asked if he would like to give me some different suggested lunch period or work schedule, and he said he would. I never received it. * * *

9/ While discussions concerning a change in the academic schedule and meal periods were taking place, separate negotiations for a new basic agreement had commenced. However, on February 19, 1970, after the initial negotiating sessions for a new basic agreement, the parties agreed to recess negotiations pending receipt of implementing instructions under the new Executive Order 11491. Thereafter, and at all times pertinent, the parties periodically extended operation of the existing basic agreement.

for negotiation." The Colonel assertedly responded, "Well, I kind of thought you might look at it like that." Grider made no counter-proposals. 10/

Bobby L. Harnage, the Union's national representative, testified that on January 15, 1970, while drafting proposals for a new basic agreement, he was informed that the Army wanted "to meet with the Union for the purpose of discussing a change in the tour of duty of the Signal School instructors." The next day, January 16, he attended the meeting in Colonel Sanders' office. There, Mr. Harnage informed the Army's representatives that "we were at the bargaining table, we had exchanged proposals on the contract which included a change in the tour of duties, and we considered this a negotiable matter *** we would not enter into a single or individual agreement away from the bargaining table * * *." The Union never submitted any counter-proposals to the Army's proposed changes in the tour of duty and meal period. Instead, the Union "made it known to the Employer [that it] considered [the subject] negotiable, and * * *would resolve it at the bargaining table." 11/

Thereafter, by letter dated January 19, 1970, Colonel James C. Borroum mailed to the Union's business agent, Jack D. Wyland, copies of a notification of change in academic hours for the School, to be effective February 2, 1970. The notification, dated January 16, 1970, provided as follows:

10/ Grider also testified that prior to this meeting the Union gave the Army a draft or proposal of a basic contract for negotiation, and the proposed contract included a change in the hours of work and hours of duty language set forth in Article X. Later, Grider testified, "I'm not sure whether it contained that or not." Another witness for the Union, Jack Wyland, business agent for the Local involved, testified that the Army was given a draft contract prior to January 16, 1970, which included a proposed change in Article X of the present contract.

11/ Colonel Moran testified, inter alia, that he presented at the January 16 meeting a proposed schedule for academic hours and lunch period, and that the Union representatives declined to agree to that schedule or submit any counter-proposals. I find that the testimony of Mr. Harnage, Mr. Grider, and Colonel Moran, as summarized above, is in all material respects mutually corroborative and I credit it as a composite explanation of what transpired at the January 16 meeting.

1. Effective 2 February 1970 the academic hours for the USASESS will be as follows:

1st Shift		2d Shift	
1	0700-0750	1	1550-1640
2	0800-0850	2	1650-1740
3	0850-0940	3	1740-1830
4	0950-1040	4	1840-1930
5	1050-1140	Lunch	1930-2050
Lunch	1140-1300	5	2050-2140
6	1300-1350	6	2150-2240
7	1400-1450	7	2250-2340
8	1450-1540	8	2340-0030

2. The tour of duty for military instructors and military staff assigned to the academic departments will be as follows:

1st Shift		2d Shift	
	0650-1150		1540-1940
Lunch	1150-1250	Lunch	1940-2040
	1250-1550		2040-0040

3. There will be no change in the present tour of duty for civilian instructors and civilian staff assigned to the Academic Departments. Specifically the tour of duty will be:

1st Shift		2d Shift	
	0650-1105		1430-1905
Lunch	1105-1135	Lunch	1905-1935
	1135-1520		1935-2300

On January 20, 1970, the Army amended its notification to show that the effective date would be February 3, 1970, and that the tour of duty for civilian instructors and civilian staff would be:

1st Shift		2d Shift	
0650-1150		1540-1940	
1150-1220	Lunch	1940-2010	Lunch
1220-1520		2010-0010	

Some eight months later, by letter dated September 28, 1970, Colonel Sanders advised the Union's president, Phanuel E. Grider, as follows:

> As you know, effective 2 February 1970, the US Army Southeastern Signal School revised its academic schedule so as to comply with the standard academic hour of 50 minutes of instruction as prescribed by para 25, a(1) and (2), Annex Q, USCONARC Reg 350-1 and for the objective of producing a better trained soldier. This had the effect of lengthening the academic day for the students by 40 minutes.
>
> You will recall also that on 18 December 1969, and again on 23 December 1969, informal conferences were held in the office of the Commandant, SESS, with officers of Local 2017, SESS, and the Center Headquarters in attendance, for the purpose of discussing the planned revision of the academic schedule and to attempt to reach agreement on needed corollary adjustment to the instructor's scheduled tour of duty. Stated in simple terms, the needed change as far as instructors are concerned was to increase their lunch break from 30 minutes to one hour. Inasmuch as agreement was not reached in these informal conferences, a formal meeting was held in the office of the Deputy Post Commander on 16 January 1970 --with yourself and Mr. Harnage representing Local 2017, and Colonel Sanders and Colonel Moran representing the employer, in attendance --the purpose of which was to discuss and consult regarding a proposed "Memorandum of Understanding Regarding USASESS Civilian Work Hours." You were furnished a copy of a Memorandum for Record of that meeting, the last paragraph of which reflects the fact that you declined to agree to the proposed Memorandum of Understanding in its present form or to offer alternative suggestions for consideration. It is considered that these three conferences meet the requirement of consulting with Local 2017 prior to implementing a contemplated change in the regularly scheduled workday or workweek as provided in Section 2, Article X, of the Basic Agreement.

> We had hoped that the matter of changing the scheduled workday would be resolved in negotiations to amend or revise the Basic Agreement generally, but then negotiations continue to be delayed. Having reflected patience and tolerance during these several months, it is now deemed necessary to invoke management's right to change the hours of the scheduled workday or workweek in order to maintain the efficiency of the Government operations with which entrusted. In this connection, your attention is invited to Section 1, Article II, of the Basic Agreement, and to Section 11(b) and Section 12(b) of Executive Order 11491.
>
> You are hereby advised, therefore, that effective with the workweek beginning 11 October 1970-or, more specifically, beginning with the workday of 12 October 1970, the scheduled workday for the civilian employees in the office of the Director of Instruction of the Southeastern Signal School, and its five academic departments will be as follows:
>
> 1st Shift: 0650 to 1550, with a lunch break from 1150 to 1250
>
> 2d Shift: 1540 to 0040, with a lunch break from 1940 to 2040
>
> Should you desire to submit positive alternate proposals for consideration it is requested that you do so in writing, with clear statements of reasons and justifications for such proposals, not later than 5 October 1970.

. . . . . .

To the same effect, a notification of change in the civilian work schedule, dated September 28 and effective on October 12, 1970, was distributed by Colonel Moran. The notification states the work hours effective October 12, 1970, as follows:

a. Civilian employees of the Office of the Director of Instruction, and support divisions thereunder; namely the TV, Curricula, IMD and Evaluation Divisions:

0700-1200
1200-1300 Lunch
1300-1600

b. Civilian employees of the five academic departments:

1st Shift		2d Shift	
0650-1150		1540-1940	
1150-1250	Lunch	1940-2040	Lunch
1250-1550		2040-0040	

c. Work hours for all other civilian employees remain unchanged.

d. Work hours for military personnel will be the same as for civilian employees of their respective element.

. . . . .

On September 29, 1970, Union President Grider replied to Colonel Sanders' letter of September 28, stating in part:

> * * * The Union's position on the matter is the same it was in January 1970. The tour of duty is a negotiable matters [sic] and should be resolved at the bargaining table. Therefore, your letter has been referred to Mr. Bobby L. Harnage * * *.

On the same day, September 29, Mr. Harnage wrote Colonel Sanders a letter, stating as follows:

"I have read your letter with great concern and interest. The letter is not completely fact and reflects a gross misinterpretation of Executive Order 11491 and the Negotiated Basic Agreement with AFGE Local 2017. Since there is no direct connection with your reference to parts of the Agreement, the Executive Order and the changes in the hours of work, and there is no indication of your interpretations of the references, I must assume that your contention is paragraph 25, a(1) and (2), Annex Q, USCOMARC Regulation 350-1 is a governing regulation under Article II, Section 1 and Article X, Section 21 of the Agreement. I am sure there is no requirement in this regulation for one hour lunch period and the establishment of tours of duty from 0650 to 1550 and 1540 to 0040 hours for all civilian employees. Therefore, your references to the Agreement would not be applicable in this matter. I am familiar with Section 12 (b) of Executive Order 11491 but see no connection with the changing of hours of work of the civilian work force.

I believe your entire letter is based upon your interpretation of Section 11 (b) of Executive Order 11491, which you refer to. If you are acting under the misguidance that hours of work-tour of duty is not negotiable you are very much mistaken. To properly understand and interpret the applicable portion of this Section I will over simplify it. It may be read as follows: "The obligation to meet and confer does not include matters with respect to the number of employees assigned to a tour of duty; the type of position assigned to a tour of duty; or the grades of employees assigned to a tour of duty." Therefore, the hours of work-tour of duty is negotiable as it was under Executive Order 10988. Under, Article X, Section 1 of the Agreement you have negotiated away your right to change the hours of work of the civilian work force without negotiating with the Union.

We may take still another approach to the matter. On January 16, 1970, representatives of the Union and Management met for the purpose of discussing the proposed changes in the hours of work of civilian instructors. Paragraph 2 of your memorandum of the record of the meeting is not altogether true. The Union did not meet under the cognizance of consultation. Paragraph 3 is an untrue statement. The Union's position at the meeting was that the Negotiated

Agreement was open for negotiations; that the proposed change in the hours of work was a negotiable matter; therefore, the Union's alternative suggestion was the matter be resolved at the bargaining table. The Union then declined to sign your memorandum of understanding agreeing to the change.

In your letter of September 28, 1970, you state, "We had hoped that the matter of changing the scheduled workday would be resolved in negotiations to amend or revise the Basic Agreement generally, but then negotiations continue to be delayed." You further state "It is considered that these conferences meet the requirement of consulting with Local 2017 prior to implementing a contemplated change in the regularly scheduled workday or workweek..." Your attention is called to the memorandum of record dated February 19, 1970, initiated under the joint signature of the President of Local 2017 and yourself, Deputy Post Commander. The last paragraph of the memorandum states "The Employer agrees with the Local to extend the present Basic Agreement between the Employer and the Local until the date set as provided for herein to resume negotiations." You have freely and of your own accord extended the Basic Agreement and delayed negotiations aon [sic] a month to month bases as reflected in the memorandum of record executed thereafter.

Further, on September 28, 1970, you met with Union representatives and set October 19, 1970, as a date to resume negotiations, without any expression of a desire to consult or negotiate a change in the hours of duty of civilian employees. Therefore, the position of Local 2017 is the same as it was in January 1970. The Agreement is open for negotiations; the change in the hours of work is negotiable; and, the matter will be resolved at the bargaining table.

This is also to advise you that implementation of the change in the hours of work of the employees set forth in your letter dated 28 September 1970, may result in AFGE Local 2017 filing charges against the Commanding General, Fort Gordon, Georgia, of violating the Code of Fair Labor, Executive Order 11491, and the negotiated agreement between the parties.

Although the letter of Colonel Sanders to the Union (dated September 28, 1970) had stated, "Should your desire to submit positive alternate proposals for consultation it is requested you do so in writing * * * not later than October 5, 1970," neither Mr. Harnage nor Mr. Grider chose to do so in their separate responses.

Thereafter, on October 2, 1970, Colonel Sanders replied to Mr. Harnage's letter of September 29, 1970, restating the Army's position as generally summarized above. Colonel Sanders emphasized, inter alia, that the schedule change was being made in accordance with Section 2, Article X, of the basic agreement; that the Union "was consulted" on December 18 and 23, 1969, and on January 16, 1970, concerning the contemplated change; that the contemplated change is in accordance with "applicable rules and regulations"; and that, in sum, the Army has complied with the basic agreement. 11/

11/On October 13, 1970, Mr. Grider wrote Major General John C.F. Tillson, III, Commanding General of Fort Gordon, alleging, inter alia, that Army's conduct summarized above was contrary to the agreement and the Executive Order. Mr. Grider requested a written decision on the interpretation of the agreement, in accordance with Article XXX of the agreement. In addition, on October 19, 1970, Mr. Harnage purportedly sent Major General Tillson a letter which, the letter states, "constitutes the filing of an unfair labor practice charge" under Section 19(a)(6) of the Executive Order. On October 20, 1970, Major General Tillson replied to Mr. Grider's letter of October 13, 1970, deciding that the command had a right to change the workday as it did under Article X, Section 2 of the agreement. Thereafter, the parties submitted the dispute "to impartial arbitration for advisory decision* * *," pursuant to the agreement. On March 1, 1971, the arbitrator issued his advisory award. On March 11, 1971, Colonel Sanders requested Army approval to take exception to the advisory arbitration award.

At the hearing before me, no contention was made that the Assistant Secretary is without jurisdiction or, in the exercise of his discretion, should decline to determine the issues raised here because of the contractual provisions for advisory arbitration. Counsel for the Army objected to the arbitrator's decision as irrelevant. Likewise, the Union made no contention that the Assistant Secretary should decline to determine the case. The above documents were considered by me solely for background purposes.

Conclusions

I. The controlling principles

A. The applicable provisions of the Executive Order

Section 19(a)(6) of the Executive Order makes it an unfair labor practice for agency management to "refuse to consult, confer, or negotiate with a labor organization as required by this Order." Section 11(a) of the Executive Order, in turn, provides that "An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual, published agency policies and regulations, a national or other controlling agreement at a higher level in the agency, and this Order." Section 11(a) also provides that the parties "may negotiate an agreement, or any question arising thereunder; determine appropriate techniques, consistent with Section 17 of this Order [i.e., "Negotiation impasses"], to assist in such negotiation; and execute a written agreement or memorandum of understanding."

However, Section 11(b) makes it clear that:

> the obligation to meet and confer 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 practice * * *.

In addition, Section 12(a) of the Order states that "Each agreement between an agency and labor organization is subject to the following requirements --

> (a) in the administration of all matters covered by the agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level.

Section 12(b) also states in part that "management officials of the agency retain the right, in accordance with applicable laws and regulations --

> * * *
>
> (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 actions may be necessary to carry out the mission of the agency in situations of emergency * * *.

B. The holdings in the private sector

Although not controlling, the decisions issued under Sections 8(a)(5) and 8(d) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151 et seq.), may be taken into account in assessing the pertinent legal principles. See Charleston Naval Shipyard, A/SLMR No. 1, p. 3 (1970). Section 8(a)(5) of the NLRA makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees * * *." Section 8(d) defines the duty "to bargain collectively" as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours or other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder * * *." Section 8(d) also provides that where a collective bargaining agreement is in effect, the duty to bargain also means "that no party to such contract shall terminate or modify such contract" except (1) upon specified notice to the other party; (2) an offer to meet and confer with the other party for the purpose of negotiating a new or modified contract; (3) timely notification to the Federal

Mediation and Conciliation Service and to the corresponding state agency; and (4) the continuation, without resort to strike or lockout, of all terms of the existing contract for sixty days after such notice or contract expires.

In reviewing the foregoing provisions of the NLRA, the Eighth Circuit recently stated in N.L.R.B. v. St. Louis Cordage Mills, 424 F.2d 976, 979 (C.A. 8, 1970):

> As a starting point, we recognize as settled now the doctrine that, ordinarily, an employer violates Sec. 8(a)(5) and (1) when, absent waiver by the appropriate bargaining agent of its employees, it changes the wages or hours of any of its employees, or alters any other valuable incident of their employment, without allowing the bargaining agent an appropriate and meaningful opportunity to bargain about the change or alteration. Section 8(d) * * * itself makes this principle abundantly clear. [Citations omitted.]

Thus, for example, an employer ordinarily may not unilaterally institute merit increases during the term of a collective bargaining agreement unless some provision in the contract authorizes him to do so. See, generally, N.L.R.B. v. C&C Plywood Corp., 385 U.S. 421, 425 (1967). Of course, an agreement may effectively reserve to the employer "a right to modify" certain benefits "during the contract period." Cf. N.L.R.B. v. Scam Instrument Corp., 394 F.2d 884, 885 (C.A. 7, 1968), cert. denied, 393 U. S. 980. And see, N.L.R.B. v. Huttig Sash & Door Co., 377 F.2d 964, (C.A. 8, 1967) and cases cited.

C. The nature of the Army's obligation to consult, confer, or negotiate with the Union under Section 19(a)(6) of the Executive Order

In determining whether or not the Army in the instant case violated an obligation "to consult, confer, or negotiate" with the Union with respect to proposed changes in established meal periods, within the meaning of Section 19(a)(6) of the Executive Order, we look first to the pertinent provisions of the operative contract.

Article III, Section 1 of the agreement, makes it clear that "matters appropriate for consultation between the parties are policies and practices relating to working conditions which are within the discretion of the Employer, including but not limited to * * * hours of work." Article III, Section 4, similarly states that "the Employer will consult with the Lodge before making changes of prior benefits, practices or understanding which have been mutually acceptable to the Employer and the Lodge but which are not specifically covered by this Agreement." Article VI, Section 2, explains that the "lodge shall have the right to present its views to the Employer, either orally or in writing, and to have such views considered in the formulation, development, and interpretation of personnel policies and practices, and matters affecting working conditions, that are at the discretion of the Employer." Further, Section 2 provides that in "addition to the right to present its views, the Lodge has a right to be consulted by management at all levels on matters such as those specified in" Section 1 of Article III. [Emphasis added above.]

Article X specifically deals with hours of work and the basic workweek. In Section 1, it is provided that the "normal basic tour of duty shall consist of five consecutive eight-hour days, Monday through Friday, excluding 30 minutes for meal periods each day * * *." Section 2 of Article X -- like the above-quoted sections in Articles III and VI -- makes it plain that "Any contemplated change in the regularly scheduled workday or workweek shall be in accordance with applicable rules and regulations and the Lodge shall be consulted prior to its implementation." Section 3 defines tours of duty and Section 4 provides that "tours of duty will be established or changed at least two (2) weeks in advance, continued for a period of at least two pay periods, and will be announced in writing * * *." And, finally, Section 8 of Article X -- like Section 1 above -- provides "for normal meal periods of 30 minutes duration scheduled outside the hours established for the daily tour of duty * * *" [Emphasis added above].

The foregoing provisions indicate that "policies and practices relating" to "hours of work," although "within the discretion of the Employer," are "appropriate for consultation." Article X, which

specifically deals with "hours of work" and the "basic workweek," defines the "basic tour of duty" as five consecutive eight-hour days, excluding "30 minutes for meal periods each day." And, it is further provided that the Union "shall be consulted prior to *** implementation" of any "contemplated change in the regularly scheduled workday or workweek." In short, these provisions generally afford the Union the right to be consulted prior to the implementation of any contemplated change in the unit employees' tour of duty, hours of work or basic workweek and, as a necessary adjunct thereto, any contemplated modification in normal meal periods which, as demonstrated in the instant case, will necessarily affect the scheduled workday or workweek of the unit employees involved.

The Union would read the provisions of Article X (Sections 1 and 8) pertaining to 30-minute lunch periods as creating a term and condition of employment completely independent of the contractual provisions which may be modified subject to the requirement of consultation. Thus, as discussed below, the Union argues that the Army was required to negotiate and not just consult with it over any contemplated change in the meal-time contractual provision. 12/ I would reject this contention for, as stated, the contractual requirement for consultation is applicable to any contemplated change in the regularly scheduled workday or workweek and, in connection therewith, to any contemplated change in the thirty-minute

12/ Counsel for the Union argued at the hearing: ". . .changing the tour of duty could be done with consultation, but [since] a 30-minute meal period is specifically expressed in the contract. . . to change the meal period would require negotiations. . . ." In its post-hearing brief, counsel for the Union restates this position, as follows: "Therefore, the Union's position is the Employer may change the regularly scheduled workday provided AFGE Local 2017 is consulted prior to implementation of the proposed change, but may not change the meal period time without negotiations."

meal period. In fact, the modification made here in the lunch period was incidental to and required by a change in the unit employees' scheduled tour of duty. The change was made in order to eliminate the difference in the work schedules of military and civilian personnel. To require, as the Union argues, consultation on the change in the tour of duty and full scale bargaining over the incidental and related meal period change would create an incongruous situation. Further, an interpretation of the contract that would not subject any contemplated change in the 30-minute meal period provision to the requirement of consultation would be contrary to the expressed intent of the parties and the plain meaning of Article X.

The questions remain, what does the term consultation mean and did the Army fulfill this obligation. The parties generally agree that consultation invokes a lesser obligation than the general duty to meet and confer, to negotiate, or -- as the term is used in the private sector -- to bargain in good faith. The Army acknowledges that it did not fulfill the greater obligation of bargaining or negotiating, although arguably it consulted with the Union. The Executive Order itself draws a distinction between an employer's obligation "to consult," "confer," "or negotiate" in Section 19(a)(6). Elsewhere, in defining "national consultation" rights under Section 9(a)(6) of the Order, The Report and Recommendations On Labor-Management Relations In The Federal Service, August 1969, p.34, provides in part:

* * * * *

> We recommend that national consultation rights include all of the following, but not the right to negotiate:
> [1] Notification to the labor organization by the agency of proposed substantive changes in personnel policies that are of concern to employees it represents;
> [2] Opportunity for the labor organization to comment on such proposals;
> [3] Opportunity for the labor organization to suggest changes in personnel policies that are of interest to employees it represents and to have its suggestions receive careful consideration;
> [4] Opportunity for the labor organization to confer in person upon request at reasonable times;
> [5] Opportunity for the labor organization to submit its views in writing at any time.

Section 9(b) of the Executive Order generally adopts this recommended definition of "national consultation rights." Other sections of the Order would seem to use the term "consultation" in essentially the same manner. See, e.g., Sections 7(a), 7(d)(2), 7(d)(3), 7(e), 8(c). 13/

Under the circumstances of this case, the general definition of consultation quoted above from the Report reasonably states the meaning of that term as intended by the parties to the basic agreement. And, as the Army's representatives made clear during negotiation of that agreement, the Army wanted to retain the right to modify the unit employees' tour of duty and meal periods subject only to the limitation of consultation. The contract language reasonably supports this expressed intent. Compare: Robert Shaw-Fulton Controls Co., 36 Labor Arbitration Reports 1035, 1036 (Dec. 17, 1960); Mission Mfg. Co., 30 Labor Arbitration Reports 365, (Mar. 17, 1958); Allegheny Ludleem Steel Corp., 24 Arbitration Reports 393, 395 (Mar. 2, 1955); George B. Matthews & Sons, Inc., 3 Labor Arbitration Reports 313, 316-317 (May 7, 1946); Anaconda Wire & Cable Co. v. N.L.R.B., 77 LRRM 2668, 2672 (C.A. 7, 1971).

13/ In its post-hearing brief, the Union generally states:

> * * * the Employer's obligation 'to consult' carries the burden to affirmatively seek the views of the Union and to consider them in the formulation, development, and implementation of the specified policies and practices. The obligation of the Employer 'to consult' is more than a duty to give prior notice of a change to be made, or even of a chance to agree, or disagree, to a change determined to be made. * * * It assures the Union the right to present its views and have them considered in the formulation, development, and implementation of the personnel policies and practices.

D. The Army consulted with the Union over the contemplated change in the unit employees' meal periods

The credited evidence summarized above establishes that the Army in fact consulted with the Union over the contemplated change in the unit employees' meal periods and, therefore, did not violate Section 19(a)(6) of the Executive Order as charged. Thus, the Army's representatives discussed its proposed change in the work schedule and meal periods with Union representatives on three separate occasions. At the first two meetings, on December 18 and 23, 1969, the Army representatives informed the Union representatives of the School's need and desire to change the work schedule and lunch period. The Army's representatives presented a proposed schedule and invited counter-proposals from the Union's representatives. Although one of the Union's representatives offered to provide a counter-proposal, none was made. At the third meeting, on January 16, 1970, the Army's representatives presented a "Memorandum of Understanding" containing the proposed change in the scheduled workday. The Union's representatives declined to accept the Memorandum or to make counter-proposals. Finally, some eight months later on September 28, 1970, the Army's representatives notified the Union's representatives that it would institute its proposed change in schedule and stated its reasons for the change. The change in schedule was not to be effective until October 12, 1970, and the Union was invited "to submit positive alternate proposals for consideration." Again, no counter-proposals were submitted. Under these circumstances, the Army "consulted with" the Union over the contemplated change in the established meal periods.

The Union asserts in effect that any contemplated change in the meal periods should have been negotiated at the bargaining table as part of a new basic agreement. However, the parties voluntarily had extended operation of the existing basic agreement at all times pertinent to this case; the existing agreement specifically provided for consultation over the proposed changes involved here; and the Army fully complied with the operative provisions of the basic agreement.

At the hearing, the Union noted that the Army's notice of September 28 refers to "civilian employees of the Office of the Director of Instruction and support divisions thereunder" as well as "civilian employees of the five academic departments." The Union argued that this notice includes approximately 100 more unit employees than were referred to in the Army's general proposal of January 16, 1970. However, the record fails to show how this asserted difference would have altered the Union's position at the three meetings. And, although the Union was given the opportunity to make counter-proposals to this latter notice, it again declined to do so and restated its prior position. Accordingly, this asserted change in wording contained in the Army's formal notice of September 28 is without significant or substantial effect in this case. 14/

Recommendation

Upon the basis of the foregoing findings and conclusions, I recommend that the complaint filed herein against respondent be dismissed.

FRANK H. ITKIN
Hearing Examiner

Dated at Washington, D. C.,
JULY 22, 1971

14/ Since the Army, as stated above, was obligated to consult and did consult with the Union over the change involved here, it is unnecessary to pass upon the Army's contentions that its conduct was otherwise privileged under the agreement, cited regulations and Sections 11(b) and 12(b) of the Executive Order.

Further, at the close of the Union's case, the Army moved that the charges be dismissed because the Union assertedly had failed to prove a violation of the Executive Order. I took the motion under advisement and, for the reasons stated herein, would recommend dismissing the complaint.

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

UNITED STATES DEPARTMENT OF THE
AIR FORCE, 434th S.O.W., AIR FORCE
RESERVE, GRISSOM AIR FORCE BASE,
PERU, INDIANA
A/SLMR No. 149

This case involved a representation petition filed by Local 3254, American Federation of Government Employees,AFL-CIO (AFGE) seeking a unit of all Air Force Reserve component personnel of the 434th Special OperationsWing Air Force Reserve (SOW) located at the Activity, the Grissom Air Force Base (GAFB). The Intervenor, Local 1434, National Federation of Federal Employees (NFFE) previously had been granted exclusive recognition in 1967 for all eligible Air Force civilian employees, paid from appropriated funds, employed at GAFB.

The GAFB and the NFFE asserted that the employees of the 434th S.O.W. were an addition or accretion to the unit exclusively represented by the NFFE and that their current negotiated agreement, effective April 14, 1969, for a period of two years, was a bar to the petition filed by the AFGE.

The petitioned for unit covered personnel who had transferred from Bakalar Air Force Base to GAFB and were presently employees of the 434th S.O.W., one of the tenant organizations physically located at GAFB. The 305th Air Refueling Wing, the host organization of the Activity, provides all services, including personnel services for the host and tenant organizations, including the 434th S.O.W., and the Base Commander is delegated the authority to negotiate and execute collective bargaining agreements covering employees of both the host and the various tenant organizations.

The Assistant Secretary noted that the evidence established that many of the employees of the host and tenant organizations, including the 434th S.O.W., have similar skills and job classifications and, in many instances, share the same facilities and occupy the same working areas, and are subject to the centralized personnel administration applicable to all the civilian employees of the host and tenant organizations. He noted also that there has been employee interchange and transfer among those originally located at Bakalar Air Force Base and those located at GAFB and that the employees transferred from Bakalar Air Force Base to GAFB have been physically and administra-

tively integrated with the employees at GAFB.

In these circumstances, the Assistant Secretary concluded that the employees transferred from Bakalar Air Force Base to GAFB constituted an addition or accretion to the unit represented exclusively by NFFE. As the petitioned for employees were covered by a valid negotiated agreement, he ordered that the petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF THE
AIR FORCE, 434TH S.O.W., AIR FORCE
RESERVE, GRISSOM AIR FORCE BASE,
PERU, INDIANA

Activity

and

Case No. 50-5168 (25)

LOCAL 3254, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Petitioner

and

LOCAL 1434, NATIONAL FEDERATION OF
FEDERAL EMPLOYEES

Intervenor

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer William J. Thyer. 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:

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

2. The Petitioner, Local 3254, American Federation of Government Employees, AFL-CIO, herein called AFGE, seeks an election in a

unit of all Air Force Reserve component personnel located at Grissom Air Force Base, excluding all management officials, supervisors, guards, employees engaged in Federal personnel work in other than a purely clerical capacity, and professional employees. 1/

The Activity, Grissom Air Force Base, herein called GAFB, asserts that the employees in the unit sought by the AFGE constitute an addition or accretion to the recognized unit at GAFB currently represented on an exclusive basis by Local 1434, National Federation of Federal Employees, herein called NFFE, 2/ that there is an agreement bar to the petition filed by the AFGE on March 24, 1971, and finally, that the employees in the petitioned for unit do not possess a clear and identifiable community of interest separate and distinct from other employees of GAFB. The NFFE supports GAFB's position in this matter.

GAFB, which is primarily a base of the Strategic Air Command (SAC), is composed of a host organization, the 305th Air Refueling Wing, with its various operations, and several tenant organizations, including the 434th S.O.W. 3/ Generally, tenant organizations are located on Air Force bases either to receive support from, or to

1/ The unit description appears as amended at the hearing. The record is clear that the AFGE included in its petitioned for unit all civilian employees of the 434th Special Operations Wing, herein called 434th S.O.W.

2/ The unit represented by the NFFE includes all eligible Air Force civilian employees paid from appropriated funds employed at GAFB, including on-base tenant organizations. As described below, there is a negotiated agreement between GAFB and the NFFE covering the employees in the exclusively recognized unit.

3/ Other tenant organizations at GAFB are: Office of Special Investigations; Attachment 1327, United States Air Force Auditor General; 217-C Field Training Detachment Air Training Command; SAC Management Engineering Team; Air Force Communication Service 915th Squadron; 26th Weather Squadron; United States Air Force Postal and Courier Service; and U.S. Air Force Civil Air Patrol.

provide support to, the host organization. 4/ The record reveals that the Commander of the 305th Combat Support Group has been designated Base Commander and, through the 305th Combat Support Group, is responsible for providing all of the housekeeping functions at the GAFB, such as supply support, accounting and finance services, civil engineering support, transportation support, procurement, post office services, communications, building and grounds maintenance, and facilities such as post exchanges and gas stations. In addition, the Base Commander has authority to negotiate with employee organizations, and he is the only individual at GAFB with the authority to execute collective bargaining agreements negotiated with the employee representatives of the host and tenant organizations. The record shows that the Base Commander has delegated authority to the Civilian Personnel Officer, who heads the Civilian Personnel Office, to administer the civilian personnel program at GAFB.

In 1967, GAFB accorded exclusive recognition to the NFFE for a Base-wide unit. 5/ Thereafter, an agreement was negotiated between GAFB and the NFFE covering the unit. This negotiated agreement became effective on April 14, 1969, and ran for a period of two years. Subsequently, the parties negotiated a new agreement, effective May 4, 1971, covering the same unit, and running also for a period of two years. Both negotiated agreements were applicable also to employees employed in "on-base tenant organizations." In this connection, they contained two provisions under which GAFB agreed to inform all new civilian employees that the NFFE "is the exclusive representative of employees in the unit" and agreed further that it would furnish the NFFE, on a monthly basis, with a list of all new employees, including their name, position, title and grade, duty location and date entered on duty.

The 434th S.O.W. is an Air Force Reserve Organization whose mission is to fly and maintain jet fighter bomber aircraft. It is composed of Air Reserve Technicians (ART) and other civilian employees. Most all of the employees in the 434th S.O.W. came from Bakalar Air Force Base in early 1970, when Bakalar was closed down and the employees at that facility were transferred to GAFB where they could receive support from the host organization on GAFB.

4/ Host-Tenant Support Agreements, which set forth the provisions covering support and responsibilities of the host and tenant organizations, are in existence between the tenant organizations, including the 434th S.O.W., and the host organization at GAFB.

5/ Aside from the employees in the 434th S.O.W., there are some 330 civilian employees in the NFFE unit.

There are approximately 200 civilian employees employed in the 434th S.O.W. of whom approximately 122 are in the unit claimed by the AFGE.

The record reflects that there has been employee interchange and transfer between those originally located at Bakalar Air Force Base and those located at GAFB. Thus, in March 1970, approximately 20 employees who were employed in a support squadron at Bakalar Air Force Base, transferred, either as a result of reassignment or through the exercise of bumping rights, directly into various branches of the 305th SAC organization at GAFB. 6/ Moreover, since the initial transfer period, the record reveals that there have been 26 transfers of employees from the 434th S.O.W. to other organizations at GAFB and 12 transfers from various GAFB organizations to the 434th S.O.W. 7/ Moreover, the record reveals that many of the employees of the 434th S.O.W. possess skills similar to those of certain employees in other organizations on GAFB. Thus, as of April 1971, there was a total of 138 employees in similar job classifications at

6/ Examples of the transfers from Bakalar Air Force Base by reassignment to the same type of positions at GAFB are: an electrical lineman WG-10; a sheet metal maintenance mechanic WG-10; a fire fighter GS-5; an automotive mechanic WG-10; and a flight line mechanic WG-10. Others who were transferred to GAFB as a result of an initial reduction-in-force at Bakalar Air Force Base are an identification and condition verifier WG-7 to warehouseman WG-6; a mobile equipment driving tester WG-10 to motor vehicle operator WG-8; a heating equipment repairer WG-9 to motor vehicle operator WG-5; and a traffic manager GS-9 to management technician GS-7.

7/ Some of these transfers involve individuals who were transferred from the 434th S.O.W. to SAC organizations and back again to the 434th S.O.W. For example, a former stock room attendant vehicle operator employed by the 434th S.O.W. who, through a reduction-in-force, was placed into the SAC 305th Transportation Squadron, Vehicle Operations Branch as a motor vehicle operator at a lower grade was promoted on November 1, 1970, to the position of supply technician (ART) and was transferred from the SAC organization back to the 434th S.O.W. Further, an aircraft mechanic (ART) employed by the 434th S.O.W. was reassigned on November 10, 1970, through a reduction-in-force to the SAC 305th Organizational Maintenance Squadron as an aircraft mechanic at the same grade, and later was reassigned to the Aircraft Maintenance Division of the 434th S.O.W. as an aircraft mechanic (ART) at the same grade.

GAFB; 47 were employed in the 434th S.O.W., and 91 were employed in other organizations throughout GAFB. Such employees included clericals, supply technicians, laborers, painters, aircraft electricians, aircraft mechanics and motor vehicle operators. Furthermore, the record indicates that a number of employees of the 434th S.O.W. are located in the same areas as SAC employees at GAFB, within SAC buildings, although in some instances employees are separated physically by partitions. In this regard, the evidence establishes that in the hospital, employees of SAC and employees of the 434th S.O.W. work side-by-side sharing the same facilities as well as the responsibility for maintaining the cleanliness of the areas in which they work.

The record reflects also that all employees at GAFB, including those in the 434th S.O.W., are subject to the same personnel policies administered through the Civilian Personnel Office. Thus, there is a Base-wide promotion plan, uniform policies concerning employee performance evaluations, employees are subject to the same competitive area, and personnel actions, such as adverse disciplinary actions, must be coordinated through the Civilian Personnel Office. Moreover, the record reveals that training at GAFB is accomplished through the coordinated effort of all organizations on GAFB. Thus, classrooms, shops, and certain SAC employees are made available to the 434th S.O.W. for training purposes and some of the training courses are attended by the civilian employees of the 434th S.O.W., together with the civilian employees of SAC organizations at GAFB.

Further, the 434th S.O.W. participates fully with the host and other tenant organizations on GAFB in the activities of the Base. Thus, the Commander of the 434th S.O.W. attends the Base Commander's weekly staff meeting, and the 434th S.O.W. is represented on the various boards and committees at GAFB, such as the Incentive Awards Board, the Equal Opportunity Advisory Committee, the Base Real Property Resources Review Board, and the Drug Abuse Committee.

Finally, the record reveals that the NFFE and the Activity have considered the employees of the 434th S.O.W. to be within the exclusively recognized unit and that the NFFE has, in fact, undertaken to represent the employees of the 434th S.O.W. In this regard, the record shows that the NFFE successfully represented the vice president of the NFFE, who is an employee of the 434th S.O.W., in a grievance concerning promotion, and that, in addition, other employees of the 434th S.O.W. have sought advice from the president of the NFFE.

Based on the foregoing circumstances, I find that the employees of the 434th S.O.W. constitute an addition or accretion to the exclusively recognized unit represented by the NFFE at GAFB. Thus, as noted above, all the employees at GAFB, including those in the 434th S.O.W., are located physically at the Base and in many instances share the same facilities; participate in training and other programs; are subject to the same Base-wide personnel policies, including promotion

and reduction-in-force procedures administered through a central personnel office; and have similar skills and related job classifications. Moreover, the evidence establishes that there has been employee interchange and transfer among those originally located at Bakalar Air Force Base and those located at GAFB. In this regard, the record reveals that the employees transferred from Bakalar Air Force Base to GAFB have been physically and administratively integrated with the employees at GAFB and are engaged in functionally similar work. As the petitioned for employees have been effectively merged into the exclusively recognized unit and as such unit was covered by a valid negotiated agreement at the time the AFGE's petition was filed, I shall dismiss the petition in the subject case.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 50-5168 (25) be, and it hereby is, dismissed.

Dated, Washington, D.C.
April 27, 1972

W.J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

500-836 O - 73 - 15

April 27, 1972

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

DEPARTMENT OF THE NAVY,
NAVAL AIR STATION,
CORPUS CHRISTI, TEXAS
A/SLMR No. 150

This case involves a severance request by the International Association of Fire Fighters, AFL-CIO, (IAFF), for a unit of Fire Fighters, currently represented in an Activity-wide unit by the National Federation of Federal Employees, Independent, Local 797, (NFFE). The Activity and the NFFE contended that the petition in the subject case was filed untimely under Section 202.3(d) of the Assistant Secretary's Regulations and, therefore, should be dismissed. It was asserted also that the petitioned for unit is inappropriate because it would fragment an existing unit, and would not promote effective dealings and efficiency of operations. In addition, the Activity contended that the requested unit is inappropriate because it would include 3 Fire Captains (GS-7), 5 Fire Captains (GS-6) and a Fire Protection Inspector, whom it claims are supervisors within the meaning of the Order.

On December 17, 1970, the IAFF filed a petition to sever the Fire Fighters from the existing Activity-wide unit of General Schedule and Wage Grade employees at the Naval Air Station, Corpus Christi, Texas. The IAFF subsequently withdrew this petition on the erroneous advice of the Department of Labor's Labor-Management Services Administration (LMSA) that it was filed untimely with respect to the existing negotiated agreement between the NFFE and the Activity. On March 4, 1971, the IAFF filed a second petition in essentially the same unit as was specified in the original petition of December 17, 1970. The Activity and the NFFE contend that, consistent with Section 202.3(d) of the Assistant Secretary's Regulations, for a period of ninety (90) days subsequent to the withdrawal of its first petition, the IAFF was precluded from filing a second petition and that, therefore, the IAFF's petition of March 4, 1971, filed within ninety (90) days of the withdrawal, should be dismissed as untimely.

In the particular circumstances, the Assistant Secretary treated the IAFF's second petition as if it had been filed on December 17, 1970. He noted that it would be unfair to penalize the IAFF for acting to its detriment on the erroneous advice of agents of the LMSA inasmuch as the IAFF's initial petition, in fact, was filed timely within the open period of the agreement between the Activity and the incumbent labor organization which terminated on February 28, 1971.

With regard to the severance request of the IAFF, the Assistant Secretary, applying the policy enunciated in United States Naval Construction Battalion Center, A/SLMR No. 8, denied the severance request and, therefore, dismissed the IAFF's petition. In this regard, he noted the absence of any evidence that the NFFE had refused or neglected to represent any unit employees including those in the claimed unit.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
NAVAL AIR STATION,
CORPUS CHRISTI, TEXAS 1/

Activity

and

Case No. 63-2657(RO)

INTERNATIONAL ASSOCIATION OF FIRE
FIGHTERS, AFL-CIO

Petitioner

and

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES, INDEPENDENT,
LOCAL 797 2/

Intervenor

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Oscar E. Masters. 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 parties' briefs, 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. The Petitioner, International Association of Fire Fighters, AFL-CIO, herein called IAFF, seeks to sever a unit of all Fire Fighters, including 8 Fire Captains (GS-6 and GS-7), and one Fire Protection Inspector (GS-8), employed at the Naval Air Station, Corpus Christi, Texas, 3/ from an Activity-wide unit of employees currently represented on an exclusive basis by the Intervenor, the National Federation of Federal Employees, Independent, Local 797, herein called NFFE.

The NFFE was granted exclusive recognition in 1966 in an Activity-wide unit. The parties' first negotiated agreement was executed on October 12, 1966.

The Activity contends that: (1) the petition in the subject case was filed untimely under Section 202.3(d) of the Assistant Secretary's Regulations and should, therefore, be dismissed; 4/ (2) the petitioned for unit is inappropriate because it would fragment an existing unit and would not promote effective dealings and efficiency of operations; and (3) the proposed unit is inappropriate because it would include 3 Fire Captains (GS-7), 5 Fire Captains (GS-6) and a Fire Protection Inspector (GS-8) whom it claims are supervisors within the meaning of the Order. The NFFE agrees with the Activity that the petition in the subject case was filed untimely and that the petitioned for unit is inappropriate because it would fragment an existing unit.

The mission of the Naval Air Station at Corpus Christi, Texas, is to provide administrative and logistical support to all Navy and Department of Defense operations located on the Base, to maintain outlying air strips at Cabaniss and Waldron Fields, and to provide logistical services for the Naval Air Stations at Kingsville, and Beeville, Texas. The Activity employs approximately 931 civilian employees.

The Fire Division of the Activity is a component of the Air Operations Department of the Activity and is responsible for all fire protection services with respect to aircraft crash and structural fires, all services necessary to maintain and operate the arresting gear and minor landing systems, and all fire prevention inspections of the Base areas and buildings. The Fire Division has an authorized civilian complement of 88 employees which includes 1 Fire Chief (GS-11), 2 Assistant Chiefs (GS-9), 1 Supervisory Fire Protection Inspector (GS-8), 2 Supervisory Fire Protection Inspectors (GS-7), 3 Supervisory Fire Fighters (Captains, GS-7), 5 Supervisory Fire Fighters (Captains, GS-6), 14 Driver Operators (GS-5), 59 Fire Fighters (GS-3) and (GS-4) and 1 Clerk-Stenographer.

The record reveals that the Activity's Fire Fighters have distinctive job responsibilities, knowledge and skills which require specific and continuous training. In addition, when on duty, the Fire Fighters eat and sleep in their assigned stations. General Fire Fighters work a 72 hour week, consisting of three 24-hour shifts, and receive a 25 percent per annum salary premium because of their unique schedule. While reduction-in-force, promotion, grievance and discipline procedures are Activity-wide in scope and new hires are secured from the Civil Service Commission list of eligibles, the evidence reveals that there have been no temporary transfers into or out of the Fire Division, and retirement annuity benefits, life insurance coverage, and annual and sick leave are computed differently for Fire Fighters than for other civilian employees.

The Timeliness Question

The record reflects that on December 17, 1970, the IAFF filed a petition, in Case No. 63-2533(RO), seeking an election in the same unit sought by the petition in the subject case. Thereafter, on January 5, 1971, and January 8, 1971, the IAFF was informed erroneously by representatives of the Department of Labor's Labor-Management Services Administration (LMSA) that its petition of December 17 had been filed untimely with respect to a current negotiated agreement between the Activity and the NFFE and would have to be withdrawn until the existing agreement between the incumbent exclusive representative and the Activity terminated. 5/ Pursuant to this advice, the IAFF submitted a withdrawal request which was approved by the Kansas City Regional Administrator of the LMSA on January 19, 1971. Negotiations between the NFFE and the Activity, which had ceased at the time the petition of the IAFF was filed, were resumed subsequent to the approval of the withdrawal request, and a two year negotiated agreement between the Activity and the NFFE was executed on March 19, 1971.

On March 4, 1971, the IAFF filed the petition in the subject case for essentially the same unit as was specified in its original petition of December 17, 1970. As noted above, the Activity and the NFFE contend that, under Section 202.3(d) of the Assistant Secretary's Regulations the second IAFF petition should be dismissed as untimely. On the other hand, the IAFF contends that the terms of Section 202.3(d) of the

3/ The claimed unit description appears as amended at the hearing. The parties stipulated that the Activity's Fire Chief and its Assistant Chiefs are supervisors within the meaning of the Order and, as such, are excluded from the claimed unit.

4/ Section 202.3(d) provides in relevant part: "When a challenge to the representation status of an incumbent exclusive representative has been filed not more than ninety (90) days and not less than sixty (60) days prior to the terminal date of an agreement, and such challenge is subsequently dismissed or withdrawn, the /parties/ shall be afforded a ninety (90) day period free from rival claim within which to consummate an agreement."

5/ The negotiated agreement between the NFFE and the Activity, in fact, had a termination date of February 28, 1971.

Assistant Secretary's Regulations must be "liberally construed" in this instance because it would work an "injustice and interfere with the proper effectuation of the Order" to penalize the IAFF for acting on the erroneous advice of the LMSA. Citing Section 205.7 of the Assistant Secretary's Regulations 6/, the IAFF contends that dismissal of its petition of March 4, 1971, is not warranted in the particular circumstances of this case.

The record shows that the IAFF withdrew its original petition of December 17, 1970 only because of the representation of agents of the LMSA that the petition was filed untimely. In my view, it would be unfair to penalize the IAFF for acting in good faith, and to its detriment, on the erroneous advice of agents of the LMSA. Accordingly, I shall treat the IAFF's petition of March 4, 1971, as effective from the date its original petition was filed on December 17, 1970. As that petition was filed timely within the open period of the negotiated agreement which terminated on February 28, 1971, I find that it was not barred either by that negotiated agreement or by the provisions of Section 202.3(d) of the Assistant Secretary's Regulations.

The Unit Question

The record reveals that the NFFE has been the exclusive representative for all employees of the Activity, including the employees in the claimed unit, for the past six years and that the NFFE and the Activity have concluded three negotiated agreements during that period. The record indicates further that the Executive Board of the NFFE, Local 797, is composed of seven officers who currently function as stewards for the employees in the bargaining unit. While at present the Fire Division does not have its own steward, the record reflects that the Fire Division has elected its own stewards in the past. The evidence reveals that the Executive Board of the NFFE meets on a bi-monthly basis with the Commanding Officer of the Naval Air Station to discuss all issues of joint concern. Also, the Executive Board meets with various department heads on a monthly basis to discuss working conditions within single departments.

6/ Section 205.7 states:
(a) The regulations in this chapter shall be liberally construed 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 the proper effectuation of the order.

The record discloses that approximately seventy percent of all grievances at the Naval Air Station are handled informally with immediate supervisors and that only three or four grievances are filed formally each year, utilizing the standard Navy grievance procedure. With respect to the one formal grievance that has been filed by a Fire Fighter employee in recent years, the evidence establishes that this employee chose to handle the case himself and declined proffered NFFE representation. However, in that instance the NFFE participated as an observer and stated its position at the grievance hearing. The record shows that the NFFE has never refused to handle a grievance of any unit employee, nor has it refused to represent the petitioned for employees, or treated them in a disparate manner.

Based on the foregoing, I find that the petitioned for unit of Fire Fighters is not appropriate for the purpose of exclusive recognition in the absence of evidence that the NFFE has failed to represent such employees fairly and effectively. As I stated in United States Naval Construction Battalion Center, A/SLMR No. 8, "where the evidence shows that an established, effective and fair collective bargaining relationship is in existence, a separate unit carved out of the existing unit will not be found appropriate except in unusual circumstances." I find no such "unusual circumstances" in the instant case. Thus, there is no evidence that the NFFE has refused or neglected to represent any unit employees, and the record reveals that a harmonious bargaining relationship has been maintained for several years by the Activity and the NFFE covering all employees of the Activity including those in the petitioned for unit. Accordingly, I find the unit sought by the IAFF is inappropriate for the purpose of exclusive recognition, and I shall, therefore, dismiss the petition. 7/

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 63-2657(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
April 27, 1972

W.J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

7/ See United States Naval Air Station, Moffet Field, California, A/SLMR 130. In view of my decision herein to dismiss the petition, I find it unnecessary to decide the eligibility question concerning the 8 Fire Captains and the Fire Protection Inspector included in the claimed unit.

April 28, 1972

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

NATIONAL WEATHER SERVICE,
CENTRAL REGION,
A/SLMR No. 151

This case arose as a result of representation petitions filed by the National Association of Government Employees (IND), (NAGE) and American Federation of Government Employees, AFL-CIO, (AFGE).

The NAGE requested a unit of all employees assigned to the Central Region, National Weather Service, Department of Commerce, excluding employees assigned to Central Region Headquarters. The AFGE requested a unit of all employees assigned to the Central Region, National Weather Service, Department of Commerce, excluding employees in units in which there was a current exclusive representative. The NAGE then filed a petition requesting a nationwide unit of all nonsupervisory employees of the National Weather Service, excluding employees of Regional Offices' headquarters.

The Assistant Secretary found that the employees in the unit petitioned for by the AFGE have a clear and identifiable community of interest and that effective dealings and efficiency of operations would be promoted by such a comprehensive, residual unit. He noted in this regard, that the employees of the Regional Offices and the field offices work closely together to accomplish the basic mission of the National Weather Service; there is close daily contact between field employees and Regional employees; and both field and Regional employees enjoy the same fringe benefits. Moreover, the responsibility for the operation of the Region rests in the Regional Director who exercises control over the operation of the Region, including the final authority over the hiring and firing of employees, the disciplining and transferring of employees, the handling of grievances, and the authority to deal with labor organizations and to execute negotiated agreements.

The Assistant Secretary further found that the NAGE's petitions warranted dismissal because its requested units excluded headquarters employees who had a clear and identifiable community of interest with other Weather Service employees. Such fragmented units, in his view, would not promote effective dealings and efficiency of operations.

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

A/SLMR No. 151

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NATIONAL WEATHER SERVICE,
CENTRAL REGION 1/

Activity

and Case No. 60-2311

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES (IND)

Petitioner

NATIONAL WEATHER SERVICE,
CENTRAL REGION

Activity

and Case No. 60-2368

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO 2/

Petitioner

NATIONAL WEATHER SERVICE

Activity

and Case No. 22-2417

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES (IND)

Petitioner

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

2/ The name of the Petitioner in this case appears as amended at the hearing.

DECISION, ORDER AND DIRECTION OF ELECTION

Upon petitions duly filed under Section 6 of Executive Order 11491, a consolidated hearing was held before Hearing Officer Howard S. Naiman. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 3/

Upon the entire record in these cases, including briefs filed by the NAGE and the American Federation of Government Employees, AFL-CIO, herein called AFGE, the Assistant Secretary finds:

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

2. In its petition in Case No. 60-2311, the NAGE seeks an election in a unit of all employees assigned to the Central Region, National Weather Service, including professionals, but excluding all management officials, employees assigned to Central Region Headquarters except substation network specialists, employees engaged in Federal personnel work in other than a purely clerical capacity, supervisors and guards as defined by the Order, and employees assigned to National Weather Service stations at South Bend, Indiana; Denver, Colorado; Lincoln, Nebraska; Omaha and North Omaha, Nebraska; Rapid City, South Dakota; Minneapolis, Minnesota; Chicago, Illinois; and Des Moines, Iowa. 4/

In its petition in Case No. 60-2368, the AFGE seeks an election in a unit of all General Schedule (GS) and Wage Board (WB) nonsupervisory and professional employees assigned to the Central Region of the Department of Commerce, National Weather Service, "excluding supervisors, guards, management officials, and employees engaged in Federal personnel work except in a purely clerical capacity within the meaning of the Order. Also excluded were those employees in any units wherein there would be an election bar, certification bar, or contract bar in any existing exclusively recognized unit." 5/

In its petition in Case No. 22-2417, the NAGE seeks an election in a unit of all nonsupervisory employees of the National Weather Service, including professional and substation network specialists, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, supervisors and guards as defined in the Order, and employees assigned to National Weather Service Offices at Agency headquarters; Regional Offices' headquarters; Atlanta Weather Patrol; Pacific Weather Patrol; National Hurricane Center; and employees stationed at Charleston, South Carolina; San Juan, Puerto Rico; South Bend, Indiana; Denver, Colorado; Lincoln, Nebraska; Omaha and North Omaha, Nebraska; Rapid City, South Dakota; Minneapolis, Minnesota; Chicago, Illinois; Des Moines, Iowa; Vandenburg Air Force Base, California, and the Alaskan Region. 6/

Thus, the AFGE seeks essentially a regionwide unit while the NAGE seeks either a nationwide field unit excluding all Regional headquarters personnel or a regionwide unit excluding headquarters personnel in that Region.

The Activity contends that a unit encompassing the Central Region would be appropriate. In this connection, it is of the view that the existing exclusively recognized units within the Central Region represented by the AFGE and the NAGE should be included in the unit in which an election is directed so that the labor organization which wins the election would, in effect, become the exclusive representative for employees of the entire Central Region with the exception of the four employee bargaining units represented by a third labor organization not involved in this proceeding. In the alternative, the Activity supports the nationwide bargaining unit proposed by the NAGE in Case No. 22-2417.

At present, there are approximately 330 employees in various established units in the Central Region who are covered by negotiated agreements. Thus, the National Federation of Federal Employees, herein called NFFE, represents exclusively 5 units in the Central Region, 4 of which are covered by negotiated agreements. 7/ Further, the AFGE represents 7 units (including 2

3/ The Hearing Officer denied a motion of the National Association of Government Employees (IND), herein called NAGE, to adjourn the hearing. In this connection, the NAGE argued that because the parties involved had agreed as to the appropriateness of the unit, the Regional Administrator exceeded his authority in ordering a hearing. The Hearing Officer's denial of the NAGE's motion is hereby affirmed. Section 6(a)(1) of the Executive Order grants to the Assistant Secretary the power to decide questions as to the appropriate unit for the purpose of exclusive recognition. Neither the Executive Order nor the Assistant Secretary's Regulations implementing the Order require that the Assistant Secretary or his agents must accept unit inclusions or exclusions because the parties agree on such matters or that an election must be held in every case in the unit agreed upon by the parties. See Army and Air Force Exchange Service, White Sands Missile Range Exchange, White Sands Missile Range, New Mexico, A/SLMR No. 25.

4/ The NAGE amended its petition at the hearing to include employees stationed at Sioux Falls, South Dakota.

5/ The AFGE's claimed unit appears as amended at the hearing. The record indicates that there are, in fact, no WB employees in the unit sought.

6/ The NAGE's petition in Case No. 22-2417 appears as amended at the hearing.

7/ The record indicates that there is no negotiated agreement covering the NFFE's unit in the Sioux Falls, South Dakota, Weather Service Office.

located in Omaha, Nebraska) and the NAGE represents 18 units (including 2 in Kansas City) within the Central Region, all of which are covered by existing negotiated agreements. The evidence establishes that none of the petitions filed herein were timely with respect to any of the above-mentioned negotiated agreements.

The National Weather Service, herein called NWS, is one of six (6) major line components under the National Oceanic and Atmospheric Administration of the Department of Commerce. It is headed by a National Director who is responsible for the total management of the NWS and whose office is located at the NWS National Office in Washington, D. C. The National Office is divided into various sections, such as Engineering, Hydrology, Meteorological Operations, Oceanography and Systems Development. It deals primarily with budgets, fiscal matters, program management and national NWS policy. The employees at the National Office are not involved with the actual forecasting of weather but rather occupy staff positions and are concerned with the overall management of the NWS. The National Office also manages the National Meteorological Center, the National Weather Service Technical Training Center, and the Reconditioning Center, which are found in different locations throughout the country.

The NWS is divided into 6 Regional Offices, each under the command of a Regional Director who reports directly to the National Director. Under the Regional Offices are a number of weather stations. Each Regional Office is divided into several sections: Engineering, which handles the actual installation of new equipment and which monitors the service and maintenance of equipment performed by the field office technicians; Personnel, which handles budgeting matters and procurement; Operations, which has the primary responsibility for the meteorological operational functions of the weather offices within the Region; and Hydrology, which is concerned with the condition of the rivers. The employees assigned to a Regional Office are, for the most part, staff personnel who, although they may have the same job classifications as the field personnel in the weather stations within the Region, are not engaged in actual weather forecasting. Rather, such Regional Office employees are concerned primarily with the management of the Regional programs.

The evidence establishes that weather forecasting is a team effort which involves all NWS offices. Thus, all weather data gathered by each individual office is sent to a state relay point where it is channelled all over the country and all NWS offices have access to weather information gathered anywhere in the country. There is substantial contact between NWS offices located in the same geographical area as accurate weather forecasting depends on ascertaining the weather conditions in all the surrounding areas. In addition, there is frequent contact between the respective Regional Offices and their field offices particularly in the areas of specialized forecasting and consultation and forecasting of severe weather. The forecasters in the various offices prepare weather summaries which are forwarded to their counterparts in the Regional Office who review them and

make suggestions. All procurement for the field offices is accomplished through the respective Regional Offices and the individuals in the field offices who have the responsibility for procurement have substantial contact with the Regional Offices. Further, in the case of mechanical failure of equipment, there may be consultation between a field office and a Regional Office especially in emergency situations. The record reveals also that when a storm occurs and property damage is high, a team from the Regional Office is sent out to work with the field employees to determine the extent of the damage involved and how such damage could be avoided in the future.

The 6 Regional Directors have substantial control over their respective regional operations and are subject only to NWS guidelines. Thus, a Regional Director can hire and promote employees through GS-13 in the technical area and through GS-12 the administrative area. 8/ He handles all final personnel actions within his Region such as hiring, firing, disciplining of employees, promotions, awards, transfers and grievances. Also, within his Region, a Regional Director has the authority to negotiate and execute collective-bargaining agreements with labor organizations.

There are different types of weather stations within each Region; the Weather Service Forecast Office, herein called WSFO; the Weather Service Office, herein called WSO; and the Weather Service Meteorological Observatory, herein called WSMO. These offices are under the control of the Regional Director and they report directly to him.

The WSFO is one of the larger NWS offices and one WSFO is found in each state. The WSFO's are headed by a Meteorologist-in-Charge who is responsible for the overall operation of the Office. This Office uses weather data gathered by its own meteorologists and compiles it, along with weather data it receives from other NWS offices located in adjoining geographical areas as well as offices located throughout the country, to forecast the weather. It then issues the forecasts and warnings to the public within its own geographic area. The personnel of the WSFO include Senior Forecasters, Journeymen Forecasters, Specialized Forecasters and the Meteorological Technicians who handle repair and service of equipment and help the Forecasters in forecasting the weather. Also, some of the WSFO's have clerical employees. 9/

8/ The minimum area of consideration for job vacancies varies by grade. In the case of GS-2 through GS-6, it is the commuting area; for GS-7 through GS-11, it is regionwide, and for GS-12 and GS-13, the announcement is posted throughout the National Oceanic and Atmospheric Administration.

9/ The NAGE seeks to exclude these clerical employees on the grounds that they are confidential employees because they handle correspondence and typing for the Meteorologist-in-Charge who may be involved with labor relations. Because the record does not include sufficient facts to determine whether or not these employees are, in fact, confidential employees, who should be excluded from any unit found appropriate, I make no findings as to their status and eligibility.

There are 7 or 8 WSO's in each state which prepare and issue warnings of severe weather of a short-term nature. These offices use the WSFO's forecasts plus their own data to determine the weather for their immediate area. The WSO's also act as a general dissemination point of all NWS information for the public. The personnel of the WSO's include Senior Forecasters, Journeymen Forecasters and Meteorological Technicians. Like the WSFO's, the WSO's are headed by a Meteorologist-in-Charge who is responsible for the operation of the Office. 10/

The record shows there are also several specialized types of NWS centers found throughout the country. These include 11 River Forecast Centers which keep certain rivers under observation and report instances of flooding; the National Hurricane Center in Miami, Florida, under the Regional Director of the Southern Region, which is responsible for observing and forecasting hurricanes and other tropical storms and disturbances; the National Severe Storm Forecast Center in Kansas City, Missouri, under the Control of the Regional Director of the Central Region, which is responsible for observing and forecasting severe storms of the nature found in the midwestern states, and the Atlantic and Pacific Weather Patrols in which forecasters and other NWS personnel utilize ships to observe and plot weather which is approaching the continental United States.

The record reveals also that field office and Regional Office employees of the NWS have the same fringe benefits, retirement plans, leave structure, holidays, promotional policy, overtime system and shift differential. 11/

Based on the foregoing circumstances, I find that a unit encompassing all the unrepresented employees in the Central Region, as petitioned for by the AFGE in Case No. 60-2368, is appropriate for the purpose of exclusive recognition. In this connection, I find that the employees in this petitioned for unit share a clear and identifiable community of interest and that effective dealings and efficiency of operations would be promoted by such a comprehensive residual unit. 12/ Thus, the evidence establishes that employees of the Regional Office and the field offices of the Central Region work together to accomplish the basic missions of the NWS; that there is daily contact between field employees and Regional employees; that they are subject to the same promotional area of consideration; and both field and Regional employees enjoy the same fringe and other benefits. Moreover, the responsibility for the operation of the Region rests in the Regional Director who exercises control over the operations of the Region, including final authority over the hiring and firing of employees, decision making with respect to the accomplishment of the Regional goal, the disciplining and transfer of employees and the handling of grievances. In addition, the Regional Director has authority to deal with labor organizations and to execute negotiated agreements. Accordingly, I shall direct an election in the unit found appropriate.

Under the foregoing circumstances and noting the substantial authority exercised by the NWS Regional Directors over programs, personnel and labor-management relations in their respective Regions, as well as the interrelated nature and commonality of mission with respect to the Regional Offices and the field offices under their jurisdiction, I find that the units sought by the NAGE in Case Nos. 60-2311 and 22-2417 are inappropriate. Thus, a Regional unit excluding employees in the Regional Office headquarters, as requested in Case No. 60-2311, or a nationwide unit excluding all Regional Office headquarters personnel, as is petitioned for in Case No. 22-2417, would be inappropriate as such units would exclude employees who have a clear and identifiable community of interest. Such fragemented units could not reasonably be expected to promote effective dealings and efficiency of operations. Accordingly, I shall dismiss the petitions in Case Nos. 60-2311 and 22-2417.

Consistent with the above determination, I find that the following employees may constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of Executive Order 11491:

> All General Schedule (GS) employees, including professionals, assigned to the Central Region of the Department of Commerce, National Weather Service, excluding employees of the WSFO, Denver, Colorado; the WSFO, Minneapolis, Minnesota; the WSO, Lincoln, Nebraska; the WSO, Omaha, Nebraska; the WSMO, North Omaha, Nebraska; the WSO, Rapid City, South Dakota; the WSO, South Bend, Indiana; the WSFO, Chicago, Illinois; the WSMO, Chicago, Illinois; the WSO, Chicago, Illinois; the WSO, Des Moines, Iowa; the WSO, Sioux Falls, South Dakota; the WSO, Peoria, Illinois; the WSMO, Salem, Illinois; the WSO, Springfield, Illinois; the WSO, Evansville, Indiana; the WSFO, Indianapolis, Indiana; the WSO, Topeka, Kansas; the WSO, Wichita, Kansas; the WSO, Lexington, Kentucky, the WSFO, Detroit, Michigan; the WSO, Rochester, Minnesota; the NSSFC,

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10/ There are some WSMO's in the country. Their primary function is the observation of upper and surface air. Like the WSFO's and the WSO's, the WSMO's have the Meteorologist-in-Charge who is responsible for the operation of the office.

11/ Employees in the field offices are generally on 3 shifts of 8 hours, while in the Regional Offices there are only isolated instances where shifts are worked.

12/ As noted above, the AFGE's petition in Case No. 60-2368 would exclude all exclusively recognized units subject to agreement or other bars. The record reflects that there exists agreement bars with respect to all currently recognized units in the Central Region, except the Sioux Falls WSO. With respect to the Sioux Falls WSO, although the AFGE alleges in its brief that its petition was amended to include this Office, the record shows that its petition, as filed, was not intended to cover the Sioux Falls facility and at no time was it formally amended in this regard. Accordingly, in the particular circumstances herein, I find that the petition in Case No. 60-2368 does not encompass the WSO, Sioux Falls, South Dakota.

Kansas City, Missouri; the WSO, Kansas City, Missouri; the WSO, Springfield, Missouri; the WSO, Grand Island, Nebraska; the WSO, Aberdeen, South Dakota; the WSO, Green Bay, Wisconsin; the WSO, Madison, Wisconsin; the WSO, Casper, Wyoming; employees engaged in Federal personnel work in other than a purely clerical capacity, management officials and supervisors and guards as defined in the Order.

13/

As noted above, 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 the majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of the professional employees as to inclusion in a unit with nonprofessional employees must be ascertained. I, therefore, shall direct separate elections in the following voting groups:

Voting Group (a) All professional employees assigned to the Central Region of the Department of Commerce, National Weather Service; excluding employees of the WSFO, Denver, Colorado; the WSFO, Minneapolis, Minnesota; the WSO, Lincoln, Nebraska; the WSO, Omaha, Nebraska; the WSMO, North Omaha, Nebraska; the WSO, Rapid City, South Dakota; the WSO, South Bend, Indiana; the WSFO, Chicago, Illinois; the WSMO, Chicago, Illinois; the WSO, Chicago, Illinois; the WSO, Des Moines, Iowa; the WSO, Sioux Falls, South Dakota; the WSO, Peoria, Illinois; the WSMO, Salem, Illinois; the WSO, Springfield, Illinois; the WSO, Evansville, Indiana; the WSFO, Indianapolis, Indiana; the WSO, Topeka, Kansas; the WSO, Wichita, Kansas; the WSO, Lexington, Kentucky; the WSFO, Detroit, Michigan; the WSO, Rochester, Minnesota; the NSSFC, Kansas City, Missouri; the WSO, Kansas City, Missouri; the WSO, Springfield, Missouri; the WSO, Grand Island, Nebraska; the WSO, Aberdeen, South Dakota; the WSO, Green Bay, Wisconsin; the WSO, Madison, Wisconsin; the WSO, Casper, Wyoming; nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials and supervisors and guards as defined in the Order.

13/ The parties, in reliance upon a ruling by the Civil Service Commission, agreed that the Meteorological Technicians were nonprofessional employees. However, because 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 Service, Region 3, Santa Fe National Forest, Santa Fe, New Mexico, A/SLMR No. 88.

Voting Group (b) All employees assigned to the Central Region of the Department of Commerce, National Weather Service; excluding employees of the WSFO, Denver, Colorado; the WSFO, Minneapolis, Minnesota; the WSO, Lincoln, Nebraska; the WSO, Omaha, Nebraska; the WSMO, North Omaha, Nebraska; the WSO, Rapid City, South Dakota; the WSO, South Bend, Indiana; the WSFO, Chicago, Illinois; the WSMO, Chicago, Illinois; the WSO, Chicago, Illinois; the WSO, Des Moines, Iowa; the WSO, Sioux Falls, South Dakota; the WSO, Peoria, Illinois; the WSMO, Salem, Illinois; the WSO, Springfield, Illinois; the WSO, Evansville, Indiana; the WSFO, Indianapolis, Indiana; the WSO, Topeka, Kansas; the WSO, Wichita, Kansas; the WSO, Lexington, Kentucky; the WSFO, Detroit, Michigan; the WSO, Rochester, Minnesota; the NSSFC, Kansas City, Missouri; the WSO, Kansas City, Missouri; the WSO, Springfield, Missouri; the WSO, Grand Island, Nebraska; the WSO, Aberdeen, South Dakota; the WSO, Green Bay, Wisconsin; the WSO, Madison, Wisconsin; the WSO, Casper, Wyoming; professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials and supervisors and guards as defined in the Order.

The employees in the nonprofessional voting group (b) will be polled whether they desire to be represented by the AFGE, by the NAGE, or by neither. 14/

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 AFGE, by the NAGE, or by neither. In the event that a majority of the valid votes of voting group (a) are cast in favor or inclusion in the same unit as nonprofessional employees, the ballots of voting group (a) shall be combined with those of voting group (b).

In the event that a majority of the valid votes of voting group (a) are not 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 AFGE, the NAGE, or neither was selected by the professional employee unit.

The unit determination in the subject case is based, in part, then, upon the results of the election among the professional employees. However, I will now make the following findings in regard to the appropriate unit:

14/ As the NAGE's showing of interest is sufficient to treat it as an intervenor in Case No. 60-2368, I shall direct that its name be placed on the ballot. However, because the unit found appropriate differs from the units it sought initially in Case Nos. 60-2311 and 22-2417, I shall permit it to withdraw from the election upon notice to the appropriate Area Administrator within ten days of the issuance of this Decision.

1. If a majority of the professional employees votes for inclusion in the same unit as the nonprofessional employees, I find 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 professional and nonprofessional employees assigned to the Central Region of the Department of Commerce, National Weather Service; excluding employees of the WSFO, Denver, Colorado; the WSFO, Minneapolis, Minnesota; the WSO, Lincoln, Nebraska; the WSO, Omaha, Nebraska; the WSMO, North Omaha, Nebraska; the WSO, Rapid City, South Dakota; the WSO, South Bend, Indiana; the WSFO, Chicago, Illinois; the WSMO, Chicago, Illinois; the WSO, Chicago, Illinois; the WSO, Des Moines, Iowa; the WSO, Sioux Falls, South Dakota; the WSO, Peoria, Illinois; the WSMO, Salem, Illinois; the WSO, Springfield, Illinois; the WSO, Evansville, Indiana; the WSFO, Indianapolis, Indiana; the WSO, Topeka, Kansas; the WSO, Wichita, Kansas; the WSO, Lexington, Kentucky; the WSFO, Detroit, Michigan; the WSO, Rochester, Minnesota; the NSSFC, Kansas City, Missouri; the WSO, Kansas City, Missouri; the WSO, Springfield, Missouri; the WSO, Grand Island, Nebraska; the WSO, Aberdeen, South Dakota; the WSO, Green Bay, Wisconsin; the WSO, Madison, Wisconsin; the WSO, Casper, Wyoming; employees engaged in Federal personnel work in other than a purely clerical capacity, management officials and supervisors and guards as defined in the Order.

2. If the 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 professional employees assigned to the Central Region of the Department of Commerce, National Weather Service; excluding employees of the WSFO, Denver, Colorado; the WSFO, Minneapolis, Minnesota; the WSO, Lincoln, Nebraska; the WSO, Omaha, Nebraska; the WSMO, North Omaha, Nebraska; the WSO, Rapid City, South Dakota; the WSO, South Bend, Indiana; the WSFO, Chicago, Illinois; the WSMO, Chicago, Illinois; the WSO, Chicago, Illinois; the WSO, Des Moines, Iowa; the WSO, Sioux Falls, South Dakota; the WSO, Peoria, Illinois; the WSMO, Salem, Illinois; the WSO, Springfield, Illinois; the WSO, Evansville, Indiana; the WSFO, Indianapolis, Indiana; the WSO, Topeka, Kansas; the WSO, Wichita, Kansas; the WSO, Lexington, Kentucky; the WSFO, Detroit, Michigan; the WSO, Rochester, Minnesota; the NSSFC, Kansas City, Missouri; the WSO, Kansas City, Missouri; the WSO, Springfield, Missouri; the WSO, Grand Island, Nebraska; the WSO, Aberdeen, South Dakota; the WSO, Green Bay, Wisconsin; the WSO, Madison, Wisconsin; the WSO, Casper, Wyoming; nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials and supervisors and guards as defined in the Order.

(b) All nonprofessional employees assigned to the Central Region of the Department of Commerce, National Weather Service; excluding employees of the WSFO, Denver, Colorado; the WSFO, Minneapolis, Minnesota; the WSO, Lincoln, Nebraska; the WSO, Omaha, Nebraska; the WSMO, North Omaha, Nebraska; the WSO, Rapid City, South Dakota; the WSO, South Bend, Indiana; the WSFO, Chicago, Illinois; the WSMO, Chicago, Illinois; the WSO, Chicago, Illinois; the WSO, Des Moines, Iowa; the WSO, Sioux Falls, South Dakota; the WSO, Peoria, Illinois; the WSMO, Salem, Illinois; the WSO, Springfield, Illinois; the WSO, Evansville, Indiana; the WSFO, Indianapolis, Indiana, the WSO, Topeka, Kansas; the WSO, Wichita, Kansas; the WSO, Lexington, Kentucky; the WSFO, Detroit, Michigan; the WSO, Rochester, Minnesota; the NSSFC, Kansas City, Missouri; the WSO, Kansas City, Missouri; the WSO, Springfield, Missouri; the WSO, Grand Island, Nebraska; the WSO, Aberdeen, South Dakota; the WSO, Green Bay, Wisconsin; the WSO, Madison, Wisconsin; the WSO, Casper, Wyoming; professional employees, employees engaged in Federal personnel work in other than a purely clerlical capacity, management officials and supervisors and guards as defined in the Order.

ORDER

IT IS HEREBY ORDERED that the petitions filed in Case Nos. 60-2311 and 22-2417 be, and they hereby are, dismissed.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 45 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 the period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the

designated payroll period, and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, AFL-CIO, or by the National Association of Government Employees (IND), or by neither.

Dated, Washington, D. C.
April 28, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

April 28, 1972

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

TREASURY DEPARTMENT,
BUREAU OF CUSTOMS,
REGION IV
A/SLMR No. 152

This case arose as a result of a representation petition filed by the National Customs Service Association (NCSA) seeking an election among all nonsupervisory employees of the Activity in a regionwide unit. The American Federation of Government Employees, AFL-CIO, Local 2577, (AFGE), intervened on the basis of its negotiated agreement with the San Juan, Puerto Rico District, an organizational component of the Activity. The AFGE took the position that the petitioned for unit was not appropriate, and that the petition was untimely filed with respect to its negotiated agreement with the Puerto Rico District. The Activity agrees with the NCSA that the petitioned for unit is appropriate, and that it would promote effective dealings and efficiency of operations.

The Assistant Secretary found that the NCSA petition was filed on the 59th day prior to the terminal date of the negotiated agreement between the Activity and the AFGE covering the Puerto Rico District and thus was untimely filed under the provisions of Section 202.3(c) of the Assistant Secretary's Regulations.

The Assistant Secretary further found that there is a clear and identifiable community of interest among all nonsupervisory employees of Region IV, and that a residual unit of all unrepresented employees of the Region would promote effective dealings and efficiency of operations. In reaching this conclusion, the Assistant Secretary noted that all employees of the Region are hired pursuant to the same regulations and policies; that their assigned duties are uniform within the same classifications; that they are evaluated according to uniform requirements; that they are paid according to a uniform policy, according to their respective classifications and experience; that they are subject to a common, centralized supervisory hierarchy; that they enjoy uniform personnel and labor relations policies; and that there is a substantial degree of transfer among the various organizational components within the Region, and a high degree of organizational cooperation and interrelationship in achieving the Region's mission. Under these circumstances, the Assistant Secretary ordered an election among the employees of the Region, excluding the employees in the San Juan, Puerto Rico District.

The Assistant Secretary further found that employees designated as "team leaders" are not supervisors within the meaning of the Order, and should be included in the unit found appropriate. In addition, the

Assistant Secretary found that, employees designated as "intermittent" should be included in the unit found appropriate. In this regard, he noted that the "intermittent" employees share with regular full-time employees the same supervision, pay, job assignments, working conditions, uniform labor relations policies and have a reasonable expectancy of continued employment from year to year.

Accordingly, the Assistant Secretary ordered an election among employees of the Activity, excluding the Puerto Rico District, if the appropriate Area Administrator finds that the NCSA's showing of interest was adequate with the addition of the "team leaders" and the "intermittent" employees and the exclusion of the Puerto Rico District.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

TREASURY DEPARTMENT,
BUREAU OF CUSTOMS,
REGION IV

Activity

and

Case No. 42-1448

NATIONAL CUSTOMS SERVICE ASSOCIATION

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, Local 2577

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer B.R. Withers, Jr. 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 all the parties, the Assistant Secretary finds:

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

2. Petitioner, National Customs Service Association, herein called NCSA, seeks an election in a unit of all employees in Bureau of Customs, Region IV, excluding professional employees, management officials, employees engaged in personnel work other than in a purely clerical capacity, and supervisors and guards as defined in Executive Order 11491. 2/

The Activity takes the position that the petitioned for unit is appropriate for the purpose of exclusive recognition, and that such a unit would promote efficiency of operations and effective dealings. The AFGE, which is currently recognized as the exclusive bargaining representative for all nonsupervisory employees in the Puerto Rico District of the Activity, asserts that the petitioned for unit is not appropriate; that its Puerto Rico District unit should not be disturbed; that the petition herein is untimely with respect to the Puerto Rico District; and that various district units rather than a Regional unit would be appropriate.

The record reveals that seven of the nine Regions of the Customs Bureau have granted exclusive recognition to labor organizations covering all employees on a Region-wide basis. Region IV, the Activity herein, is one of the two Regions which has not granted exclusive recognition on a Region-wide basis. In this regard, the evidence establishes that the Activity granted exclusive recognition, under Executive Order 10988, to the AFGE in a unit comprised of all nonsupervisory employees employed within one of its components, the Puerto Rico District. Further, there is a current negotiated agreement between the Activity and the AFGE covering the employees in this unit.

The record reveals that the current negotiated agreement between the Activity and the AFGE became effective March 27, 1967, and ran for a period of two years thereafter. It provided that in the absence of timely notice to terminate or modify by either party to the agreement, it would automatically renew itself for one year periods thereafter. In view of the absence of any evidence of timely notice by either of the parties to terminate or modify the agreement, it is clear that the petition herein, which was filed on January 26, 1971, was filed on the 59th day prior to the terminal date of the agreement. 3/ In these circumstances, I find that the

1/ At the hearing and in its brief the Intervenor, American Federation of Government Employees, AFL-CIO, Local 2577, herein called AFGE, took exception to the rulings made by the Regional Administrator prior to the opening of the hearing, and by the Hearing Officer during the hearing, with regard to a motion joined in by all the parties to postpone the opening of the hearing. In addition, at the hearing, the AFGE moved to hold at least one session of the hearing in Puerto Rico for the convenience of the AFGE's witnesses. This latter motion also was denied by the Hearing Officer. Under all the circumstances, I find that the rulings made by the Regional Administrator and the Hearing Officer were not prejudicial to the rights of any of the parties herein, and I hereby affirm their rulings.

With regard to the denial of the motion to delay the opening of the hearing in this matter, in the circumstances disclosed herein, including the AFGE's contentions, I find that there is insufficient evidence to establish that the actions of the Regional Administrator or the Hearing Officer were arbitrary or capricious or constituted an abuse of discretion. As to the AFGE's motion seeking to have one session of the hearing in this matter held in Puerto Rico, it should be noted that the petition herein seeks an Activity-wide unit, and that the hearing was held at the situs of the headquarters of the Activity. Although it is desirable to hold hearings at reasonably convenient sites, it is obvious that hearings cannot always be held at every site which might be desired by the parties and that some discretion must be exercised in designating hearing locations. Moreover, despite its contention that its presentation was handicapped by the failure to hold at least one session of the hearing in the subject case in Puerto Rico, the AFGE did not make an offer of proof of the evidence such a session would produce. Under all the circumstances, therefore, the Hearing Officer's ruling in this regard was proper.

2/ The unit sought appears as amended at the hearing.

3/ Contrary to the assertions of the NCSA in its brief, the formula established in Report on a Ruling of the Assistant Secretary, Report No. 38, for computation of the 60-90 day open period for the filing of petitions was not prospective. Thus, Report No. 38 merely explicated, in detail, the existing provisions of Section 202.3(c) of the Assistant Secretary's Regulations, which provide, in part, that a petition will not be considered timely if filed during the period an agreement is in force..."unless (1) /the/ petition is filed not more than ninety (90) days and not less than sixty (60) days prior to the terminal date of such agreement...."

petition in the subject case was filed untimely with regard to the exclusive bargaining unit (the Puerto Rico District) covered by the negotiated agreement between the Activity and the AFGE.

The Bureau of Customs is an Activity within the United States Treasury Department, and consists of a National Office, located in Washington, D.C., and nine Regional Offices, located throughout the country. It has the overall mission of collecting and protecting revenue and enforcing customs laws and all related laws of the United States. The Bureau is under the overall supervision of the Commissioner of Customs, who is located in the National Office. Each of the nine Regions, with the exception of Region II, is further subdivided into districts, ports and stations. Nationwide, there are 43 districts, approximately 292 ports and approximately 700 stations.

The Activity involved in the subject case encompasses the States of North Carolina, South Carolina, Georgia, that portion of Florida situated east of 83° longitude, and the territories of Puerto Rico, and the Virgin Islands. The seven districts in the Region are located in Miami, Florida; Tampa, Florida; Savannah, Georgia; Charleston, South Carolina; Wilmington, North Carolina; St. Thomas, Virgin Islands; and San Juan, Puerto Rico.

Organizationally, the Activity is under the overall supervision of a Regional Commissioner. In addition, there are two Assistant Regional Commissioners, one in charge of Operations, and the other in charge of Administration. The Regional Commissioner and his headquarters staff are located in the Regional Headquarters Office in Miami, Florida.

That portion of the Headquarters facility under the Assistant Regional Commissioner for Operations is subdivided into two Divisions; the Inspection and Control Division and the Classification and Value Division. Each of these Divisions is supervised by a Supervisory Operations Officer and, in the Regional Headquarters Office, the Divisions employ various operations officers, liquidators and clerical employees. In addition, the Assistant Regional Commissioner for Operations directs the activities of two laboratories, which are located in Savannah, Georgia, and San Juan, Puerto Rico. Each of these laboratories is supervised by a Physical Science Administrator, who is responsible directly to the Assistant Regional Commissioner. The Office of the Assistant Regional Commissioner for Administration is subdivided into three Divisions: the Personnel Management Division; the Management Services Division; and the Financial Management Division. The Personnel Management Division is supervised by a Personnel Officer; the Management Service Division is supervised by an Administrative Officer; and, the Financial Management Division is supervised by a Financial Manager. In addition, the Regional Headquarters Office contains the Office of the Regional Counsel and his Assistant, who are available to the Regional Commissioner

for legal advice, but who are responsible directly to the Office of the General Counsel in Washington, D.C.

Each District is under the supervision of a District Director and two Assistant District Directors, one in charge of the Inspection and Control Division, and the other in charge of the Classification and Value Division. 4/ Each District is further subdivided into ports, under the direction of Port Directors. The number of ports vary from District to District, and the staff assigned each port varies depending upon the size of the export - import operations at the port involved.

Virtually all of the Customs Service employees engaged in operations are divided between the Inspection and Control Division and the Classification and Value Division. Essentially, the Inspection and Control Division is engaged in the actual examination of imports and exports, baggage and mail, and the actual or constructive possession of imports, exports, baggage and mail, and its release from custody. The employee classifications found in this Division are inspectors, inspector aids, and warehouse officers. The employees in the Classification and Value Division are engaged in the determination of whether an import duty applies to the particular merchandise involved, the proper rate of duty to apply, the determination of the value of the cargo, and the collection of the duty levied. Among the employee classifications employed in this Division are import specialists, cashiers, tellers, miscellaneous document examiners, and entry aids.

The evidence establishes that personnel policies and regulations apply equally to all employees of Region IV, that personnel records for employees of the Region are maintained in the Regional Headquarters Office, and that all employees are hired, classified and assigned to duty stations by the Regional Headquarters personnel staff. Moreover, uniform policies and standards are established and enforced by the Regional Headquarters concerning job performance evaluations, standards of conduct, and promotions for all employees throughout the Region. All discipline beyond oral admonishment is administered solely by the Regional Commissioner, and all outstanding achievement awards must emanate from the Regional Headquarters Office. Uniform career and personnel training programs are prepared and, in some instances, are

4/ The Virgin Islands District is an exception to the general organization of the Districts. There, the District Director is assisted by only one Assistant Director. The Inspection and Control Division is under the supervision of a Supervisory Inspector, and the supervision of the Classification and Value Division is under a Supervisory Import Specialist. The record reveals that this form of organization was initiated as an experiment in this one District, and is unique within this Region.

conducted by the Regional Headquarters personnel for all employees of the Region. The record reveals that to fill job vacancies occurring within the Region, personnel already employed within the Region are sought. Thus, the Activity posts all job vacancies of grades GS-7 and above throughout the entire Region. All personnel within Region IV are free to bid on jobs and it appears that this method is utilized by Region IV employees for career progression, either within their classifications or to change their classifications.

The record discloses that since 1966, there have been a substantial number of transfers from the Region IV Headquarters Office to various District Offices within the Region, from various District Offices to the Headquarters Office, or from District Office to District Office. Further, the record shows that when a District Office encounters a particular commodity or product with which the employees of another District have become "expert" there is consultation and cooperation among the employees of the Districts within the Region in order to properly classify and evaluate the particular commodity involved.

While all levels of supervision up to, and including District Directors, make recommendations involving all types of personnel actions affecting employees, the evidence establishes that the final decision is made at the Regional level, and the recommendations serve only as factors to be considered in reaching the ultimate determination.

In these circumstances, I find that there is a clear and identifiable community of interest among all the nonsupervisory employees of Region IV and that a residual unit of all unrepresented Regional employees would promote effective dealings and efficiency of operations. Thus, all employees are hired pursuant to the same regulations and policies; their assigned duties are uniform within the same classifications; they are evaluated according to uniform requirements; they are paid according to a uniform policy, according to their respective classifications and experience; they are subject to a common, centralized supervisory hierarchy; and, they enjoy uniform personnel and labor relations policies. Further, there is a substantial degree of transfer among the various organizational components within the Region, as well as a high degree of organizational cooperation and interrelationship in achieving the Region's mission. As found above, the petition herein is untimely with regard to the Puerto Rico District bargaining unit within Region IV, which, at the time of the filing of the petition herein, was covered by a negotiated agreement. I, therefore, shall order that an election be conducted among the employees of Region IV, excluding those in the Puerto Rico

District. 5/

The record discloses also that there are issues of eligibility with respect to certain employee classifications or groups in the unit found appropriate.

Team Leaders

The record discloses that the Region utilizes Senior Import Specialists in the various Districts as "team leaders". Both the Activity and the NCSA take the position that these team leaders are supervisors and should be excluded from any bargaining unit found appropriate. The AFGE, on the other hand, contends that the team leaders are not supervisors.

The record discloses that there are a total of 36 import specialists throughout the Region designated as team leaders, who have approximately 37 subordinate employees. The evidence reveals that the teams have been established with respect to a particular type of commodity, and the members of such a team become "expert" in that commodity. The evidence further reveals that the leaders and subordinate members of the team divide the available work, and that the leader provides guidance to the other team members in the performance of their work. Although it appears that the leader is consulted by the Supervisory Import Specialist concerning the job performance of the other team employees, the record indicates that effective control and supervision of the subordinate team members reside in the Supervisory Import Specialist, to whom both the subordinate and the team leader reports. The evidence also reveals that, although the team leader has authority to approve applications for annual leave, this authority is governed by the policy requirement that at least one member of each team must be available at all times.

Based on the foregoing, I find the team leaders are not supervisors within the meaning of the Order. In my view, the evidence herein indicates that the actual relationship between the team leaders and their team members is one of a senior employee to a junior employee. Thus, each team effectively is restricted to working on a particular commodity and the available work is divided between

5/ In this connection, see Federal Aviation Administration, Department of Transportation, A/SLMR No. 122. Further, I shall not place the AFGE on the ballot as its unit of employees in Puerto Rico will not be included in the election to be conducted, and as the evidence establishes that it does not have a showing of interest with respect to the residual unit I have found appropriate.

the members of the team, including the team leader. Moreover, the team leader does not have the effective authority to direct the activity of, nor to discipline, the team members. Furthermore, the team leader's authority to approve leave requests appears to constitute merely a method by which the Activity's policy that all members of the team may not be absent on leave at the same time can be effectuated. In these circumstances, I find that team leaders should be included in the unit found appropriate herein. 6/

Intermittent Employees

The record discloses that Region IV employs a substantial number of employees it characterizes as "intermittent". As to these employees, the record discloses that they are on a "when actually employed" (WAE) basis, and that the total employment for a single employee during any one year may not exceed 700 hours. They occupy a variety of classifications, but primarily are located in the Inspection and Control Division throughout the Region, and the bulk of them are employed as inspectors. The record discloses that there are approximately 240 such employees employed throughout the Region, and that they perform their duties, generally in cooperation and side by side with, the regular full time employees. Also, while they enjoy none of the regular fringe benefits of employment, they share the same working conditions, mission and supervision as the regular full time employees. The evidence establishes that employees designated by the Activity as "intermittent" have a reasonable expectancy of continued employment year after year, with the only restriction being that they may be employed no more than 700 hours in any one year. The record reveals also that in recent years there has been a decreasing incidence of turnover among such employees, and that the Activity has a policy of granting step increases to intermittent employees upon their completion of a sufficient

6/ It was noted also that in most instances team leaders work with either one or no subordinate team members. In this regard, see United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, A/SLMR No. 120; New Jersey Department of Defense, A/SLMR No. 121.

number of hours of employment to equal one year's full-time employment. 7/

Because the record reveals that, aside from the restrictions of a maximum number of hours employed during the period of one year, "intermittent" employees have a reasonable expectancy of continued employment from year to year, and that they share with regular full-time employees common supervision, pay scale, job assignments, working conditions, and uniform labor relations policies, I find that such "intermittent" employees should be included in the unit found appropriate. 8/

Based on the foregoing, I find the following employees of the Activity constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491:

> All employees of Customs Bureau, Region IV, including employees designated as team leaders and "intermittent" employees, excluding all employees employed in the Puerto Rico District, professional employees, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

7/ The record further reveals that there is a classification of employees designated by the Activity as "part-time" employees; that is, employees who are appointed for a definite duration of time, ranging from 90 days to one year. The evidence further reveals that there are a total of 8 such employees employed within the Region and that their classifications are varied. As the record does not disclose whether these employees have a reasonable expectancy of employment beyond the period of their appointments, there is insufficient basis upon which to base any judgment as to their eligibility. I, therefore, make no findings as to these employees.

8/ Additionally, the Activity sought to exclude a number of classifications of employees, including the secretaries to the various District Directors, the Assistant Regional Commissioners and the Regional Commissioner. Based upon the evidence that the secretaries have access to confidential information relating to labor-management relations matters, I will exclude them from the unit found appropriate as confidential employees. With respect to the several other classifications of employees sought to be excluded by the Activity, there was insufficient evidence adduced and I, therefore, make no findings with respect to their eligibility or status.

DIRECTION OF ELECTION 9/

An election by secret ballot shall be conducted among the employees in the unit found appropriate as early as possible, but not later than 45 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 are 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 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 Customs Service Association.

Dated, Washington, D.C.
April 28, 1972

W.J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

9/ The record in the subject case is unclear as to whether the inclusion of the team leaders and the "intermittent" employees in the petitioned for unit, as well as the exclusion of the employees in the Puerto Rico District, renders inadequate the NCSA's showing of interest. Accordingly, before proceeding to an election in the subject case, the appropriate Area Administrator is directed to reevaluate the showing of interest. If he determines that, based on the inclusion and exclusion of certain employees in the above named categories, the NCSA's showing of interest is inadequate, the petition in this case should be dismissed.

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

PORTLAND AREA OFFICE,
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT (HUD)
A/SLMR No. 153

Pursuant to the Decision and Remand of the Assistant Secretary in A/SLMR No. 111, a subsequent hearing was held in this case for the purpose of adducing evidence concerning the appropriateness of the unit sought by Local 7, National Federation of Federal Employees, Independent, and Local 3293, American Federation of Government Employees, AFL-CIO, and concerning also the duties and responsibilities of the Labor Relations Specialist in order to determine whether he should be included in or excluded from any unit found appropriate.

The Assistant Secretary found that a unit of all employees of the HUD's Portland Area Office was appropriate for the purpose of exclusive recognition and would promote effective dealings and efficiency of agency operations. He based his finding on the fact that the Portland Area Office functions as a separate autonomous unit under the direction of the Area Director who is responsible for hiring, firing, grievances, discipline and labor relations and whose decisions are generally not subject to review by the Regional Office in Seattle, Washington. He noted also that there is little contact between personnel in the Regional Office and those in the Portland Area Office; that the Regional Office is engaged in staff functions while the Area Office is engaged in operations; that the job titles and skills required to handle such functions are different in the Area Office and the Regional Office; and that there is virtually no transfer or interchange between employees in the Area Office and the Regional Office.

The Assistant Secretary further found that the Activity's Labor Relations Specialist was a management official as there was no evidence in the record to indicate that the parties' stipulation in this regard was improper.

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A/SLMR No. 153

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

PORTLAND AREA OFFICE,
DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT

Activity

and

Case No. 71-1770(RO)

LOCAL 7, NATIONAL FEDERATION OF
FEDERAL EMPLOYEES, INDEPENDENT

Petitioner

and

LOCAL 3293, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Petitioner

SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION

Upon petitions duly filed under Section 6 of Executive Order 11491, a hearing was held in the subject case. Thereafter, on November 30, 1971, I issued a Decision and Remand, 1/ in which, among other things, I ordered that the subject case be remanded to the appropriate Regional Administrator for the purpose of reopening the record to secure additional evidence concerning the appropriateness of the unit sought, as well as evidence concerning the duties and responsibilities of the Activity's Labor Relations Specialist in order to determine whether an employee in this classification should be included in or excluded from any unit found appropriate. On February 2, 1972, a further hearing was held before Hearing Officer Dale L. Bennett. The Hearing Officer's rulings made at the reopened hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including the facts developed at the hearings held both prior and subsequent to the remand, I find:

1/ A/SLMR No. 111.

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

2. Petitioner, Local 7, National Federation of Federal Employees, Independent, herein called NFFE, seeks an election in a unit of all General Schedule and Wage Board employees, including professionals, of the Portland Area Office, Department of Housing and Urban Development (HUD) under career and career-conditional appointments, excluding managers, supervisors, guards and employees engaged in Federal personnel work in other than a purely clerical capacity. 2/ Petitioner, Local 3293, American Federation of Government Employees, AFL-CIO, herein called AFGE, seeks essentially the same unit as that sought by the NFFE but would include also those outlying offices 3/ and persons who fall under the jurisdiction of the Portland Area Office. 4/ The Activity, in agreement with the basic position of both Petitioners, is of the view that the Portland Area Office is a unit appropriate for purpose of exclusive recognition.

Region X of the Department of Housing and Urban Development encompasses the states of Oregon, Washington, Idaho and Alaska. It consists of a Regional Office in Seattle, Area Offices in Portland, Oregon, and Seattle, Washington, 5/ and HUD-FHA Issuing Offices located in each of the four states within its jurisdiction. Region X is responsible for carrying out all of the HUD programs within the Regional area. The Central Office of HUD allocates to each Region a specific amount of money to fulfill the needs of the HUD program in that Region and the Regional Office then divides that sum of money among its Area Offices. Regional Offices do not handle any loan requests, as they are concerned primarily with staff functions, and all loans are handled in the Area Offices which are concerned with the actual operational implementation of the HUD program.

2/ The record indicates that there are no Wage Board employees in the unit sought. The NFFE also sought to exclude from its claimed unit employees classified as "temporary."

3/ Although the AFGE indicated it would include in the unit found appropriate outlying offices or persons outside the Area Office who were subject to the jurisdiction of the Portland Area Office, there is no record evidence that any personnel responsible to the Portland Area Office are, in fact, stationed outside Portland. Moreover, the record reflects that HUD-FHA Issuing Offices are directly under the authority of the Regional Office in Seattle and are not under the jurisdiction of the Area Offices in Region X.

4/ Originally, the AFGE sought to include certain "temporary" employees in its claimed unit. However, in A/SLMR No. 111, these "temporary" employees were excluded from any unit found appropriate.

5/ Pursuant to a consent election, a Certification of Representative was issued on November 26, 1971, to the AFGE for the Seattle Area Office.

The record reveals that consistent with the underlying philosophy at HUD to decentralize its operations and to have decision making authority at the lowest level, the Area Offices of HUD have been delegated substantial authority. 6/

The day-to-day functional responsibility for the Area Office operation is delegated to the Area Director who has the authority to authorize grants and loans and establish the terms thereof; to execute agreements for grants, loans and advances, and amendments thereto; to approve requisitions for funds; and to approve third-party contracts. The evidence establishes that the Area Director makes the final decision with respect to the granting of a loan and his decision is not subject to review by the Regional Office. In this regard, a party who is not satisfied with the Area Director's decision may appeal to HUD's Central Office where the final determination is made. The record reveals also that the Area Director can hire and promote up to GS-11 and his determinations in this respect are not subject to review by the Regional Office. While the Area Director is required to obtain permission from the Regional Office to promote or hire at the GS-12 or 13 levels and in this connection the Regional Office prepares a list of eligibles, the record reveals that the Area Director makes the final decisions in this respect. The latter also is responsible for firing, the disposition of Area Office employee grievances, discipline and labor relations in the Area Office. The evidence establishes also that the Area Director can negotiate and sign collective-bargaining agreements without any assistance or review by the Regional Office.

The record reveals that the employees located in the Seattle Regional Office and in the Portland Area Office are engaged in different functions and the employees have different job titles and skills.

The record reveals that there is minimal contact between the Area Office employees and those in the Regional Office, and that there is very little interchange between the employees in the Portland Area Office and the Seattle Area Office. In fact, the only interchange which occurs involves new employees who for the first year travel among the various offices to receive training in all phases of the HUD operation in order to determine where they would like to work permanently.

The Seattle Regional Office does not become involved in the operation of the Portland Area Office, unless technical assistance on particularly difficult problems is requested. While, from time to time, the Assistant Regional Administrator for Administration or one of his staff visits the Area Office to ascertain what decisions have been made and how they have been implemented, the record reflects that, generally, the Regional Office is more concerned with fact finding than with checking the operational decisions in the Area Office. Also, on occasion, a formal team review is performed in which a group from the Regional Office checks the operations at the Area Office level and, after such an investigation is completed, the review team confers with the Area Office personnel and makes recommendations for improving procedures.

Based on the foregoing circumstances, I find that a unit composed of all employees of the HUD's Portland Area Office share a clear and identifiable community of interest. Thus, as noted above, the record reveals that the Area Office functions as a separate autonomous unit under the direction of the Area Director who is responsible for all hiring, firing, grievances, discipline and labor relations in the Area. For the most part, he has the final decision making power in his Area and the evidence establishes that his decisions are not, in most instances, subject to review by the Regional Office. The record further indicates that there is little contact between Seattle Regional Office personnel and those in the Portland Area Office; that the Regional Office is engaged principally in staff functions while the Area Office is engaged in operations; that the job titles and skills required to handle work of the Area Office and Regional Office are different; and that there is virtually no transfer or interchange between personnel in the Area Office and those in the Regional Office. In these circumstances, I find that a unit encompassing the employees of the Portland Area Office is appropriate for the purpose of exclusive recognition under Executive Order 11491 and that such a unit will promote effective dealings and efficiency of agency operations. Accordingly, I shall direct an election in a unit composed of all employees of the Portland Area Office of HUD.

The parties seek to exclude the Activity's Labor Relations Specialist as a management official. As there is no evidence in the record to indicate that the parties' stipulation was improper, I find that an employee in this job classification should be excluded from the unit found appropriate.

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

> All General Schedule professional and nonprofessional employees of the Portland Area Office, Department of Housing and Urban Development under career and career-conditional appointments, including the Equal Opportunity Specialist, excluding "temporary" employees, the clerical services supervisor, the secretary to the Area Director, the Labor Relations Specialist, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order. 7/

6/ The parties agreed that the Area Office includes both professional employees such as civil engineers, architects, and attorney advisors, and nonprofessional employees such as realty specialists, program aides, inspectors, loan specialists and clerical employees.

7/ As to inclusion of the Equal Opportunity Specialist and the exclusion of "temporary" employees, the clerical services supervisor and the secretary to the Area Director, see A/SLMR No. 111.

As noted above, 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 the majority of the professional employees vote for inclusion in such a unit. Accordingly, the desire of the professional employees as to inclusion in a unit with nonprofessional employees must be ascertained. I, therefore, shall direct separate elections in the following voting groups:

Voting group (a): All General Schedule professional employees of the Portland Area Office, Department of Housing and Urban Development under career and career-conditional appointments, excluding nonprofessional employees, "temporary" employees, the clerical services supervisor, the secretary to the Area Director, the Labor Relations Specialist, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

Voting group (b): All General Schedule nonprofessional employees of the Portland Area Office, Department of Housing and Urban Development under career and career-conditional appointments, including the Equal Opportunity Specialist, excluding professional employees, "temporary" employees, the clerical services supervisor, the secretary to the Area Director, the Labor Relations Specialist, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

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

The employees in the professional voting group (a) will be asked two questions on their ballots: (1) whether or not they wish to be included with the nonprofessional employees for the purpose of exclusive recognition, and (2) whether they wish to be represented for the purpose of exclusive recognition by the AFGE, the NFFE or by neither. 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).

In the event that a majority of the valid votes of voting group (a) are not 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 AFGE, the NFFE or neither was selected by the professional employee unit.

The unit determination in the subject case is based in part, then, upon 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 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 professional and nonprofessional employees of the Portland Area Office, Department of Housing and Urban Development under career and career-conditional appointments, including the Equal Opportunity Specialist, excluding "temporary" employees, the clerical services supervisor, the secretary to the Area Director, the Labor Relations Specialist, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

2. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find that the following two groups of employees will constitute separate units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

(a) All General Schedule professional employees of the Portland Area Office, Department of Housing and Urban Development under career and career-conditional appointments, excluding the nonprofessional employees, "temporary" employees, the clerical services supervisor, the secretary to the Area Director, the Labor Relations Specialist, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

(b) All General Schedule nonprofessional employees of the Portland Area Office, Department of Housing and Urban Development under career and career-conditional appointments, including the Equal Opportunity Specialist, excluding professional employees, "temporary" employees, the clerical services supervisor, the secretary to the Area Director, the Labor Relations Specialist, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate as early as possible, but not later than 45 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 Local 3293, American Federation of Government Employees, AFL-CIO; by Local 7, National Federation of Federal Employees, Independent; or by neither.

Dated, Washington, D. C.
April 28, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

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

LONG BEACH NAVAL SHIPYARD
A/SLMR No. 154

This case involves a complaint filed by American Federation of Technical Engineers, AFL-CIO, Local 174 (Complainant) against Long Beach Naval Shipyard (Respondent) alleging violations of Sections 19(a)(1), (2), (5) and (6). The allegations were occasioned by the Respondent's admitted unilateral cancellation of an arbitration proceeding which was scheduled pursuant to the parties' negotiated agreement. The Hearing Examiner recommended dismissal of all allegations finding that although the Respondent admittedly acted unilaterally in cancelling the arbitration without consulting with the Complainant, "The dispute in question was covered by rules, regulations and laws that made implementation of any arbitrator's award favorable to the Union impossible...."

The dispute herein arose when two employees were charged with annual leave for time which they argued should have been travel days. Both filed grievances to regain their annual leave, which were processed through Steps 1 and 2 of a negotiated procedure. The Respondent denied the grievances at both steps. Pursuant to the parties' negotiated agreement, which provides for advisory arbitration as a third step of the grievance procedure, the parties agreed to submit the matter to arbitration and scheduled a hearing. Two days before the scheduled hearing, the Respondent, admittedly without consultation with or explanation to the Complainant, cancelled the arbitration. The Respondent later informed the Complainant that it considered the two grievances not to be arbitrable based on various cited regulations.

In this decision, the Assistant Secretary emphasized his view that a grievance-arbitration provision constitutes an invaluable tool for furthering labor relations harmony in the Federal service and must be honored by the parties to the fullest extent possible. Where the agreement permits either party to seek arbitration, he considered the unilateral determination of a question of arbitrability by either party to render useless such arbitration machinery. The Assistant Secretary found the Respondent's unilateral cancelling of an arbitration proceeding scheduled pursuant to its negotiated agreement to constitute an improper refusal to consult, confer, or negotiate with the Complainant. In this regard, he noted that the Respondent admittedly did not confer with or even notify the Complainant of its determination that

further proceedings would be fruitless prior to its unilateral action. Moreover, the GAO decision, which was sought by the Respondent after its unilateral cancellation of the scheduled arbitration hearing, stated clearly that the matter of charging leave was discretionary with the agency. Accordingly, the Assistant Secretary found the Respondent's conduct herein to be in derogation of its obligation to consult, confer, or negotiate and violative of Section 19(a)(6). He further found that the Respondent's conduct also constituted an independent violation of Section 19(a)(1). The Assistant Secretary concluded also that there was insufficient evidence to find a violation of Sections 19(a)(2) and 19(a)(5).

A/SLMR No. 154

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

LONG BEACH NAVAL SHIPYARD

Respondent

and

Case No. 72-2544

AMERICAN FEDERATION OF TECHNICAL ENGINEERS, AFL-CIO, LOCAL 174

Complainant

DECISION AND ORDER

On December 8, 1971, Hearing Examiner E. West Parkinson issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged, and recommending that the complaint be dismissed. Thereafter, the Complainant filed exceptions to the Hearing Examiner's Report and Recommendations with a supporting brief. The Respondent was granted permission to, and did, file a reply brief.

The Assistant Secretary has reviewed the rulings of the Hearing Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. 1/ Upon consideration of the Hearing Examiner's Report and Recommendations, the briefs of the parties, and the entire record in this case, I hereby adopt the Hearing Examiner's Report and Recommendations only to the extent consistent herewith.

1/ Inadvertently, the Hearing Examiner had been provided with the investigative file in the subject case compiled by the Area Office. Under all the circumstances, including the Hearing Examiner's statement in the record that the investigative file would not be utilized in reaching a decision in this matter and the absence of any evidence that any party herein was prejudiced by this inadvertancy, I find that the Hearing Examiner's accepting into evidence the Area Office investigative file did not constitute prejudicial error.

The complaint 2/ in the instant case was filed on May 19, 1971 by the American Federation of Technical Engineers, AFL-CIO, Local 174 (herein called the Complainant) against the Long Beach Naval Shipyard (herein called the Respondent). It alleged that the Respondent violated Sections 19(a)(1), (2), (5) and (6) of Executive Order 11491 by capriciously and unilaterally cancelling a scheduled arbitration hearing and refusing to comply with the terms and provisions of the parties' collective-bargaining agreement.

The Respondent does not dispute the fact that on March 8, 1971 without notice to or consultation with the Complainant, it cancelled an arbitration hearing scheduled to convene on March 10, 1971. It contends, however, that such action was justified by the fact that it did not have the authority to implement an arbitrator's award if he should rule in favor of the grievants involved because it would be contrary to Federal Regulations, Navy Instructions and law.

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

A dispute arose when two of Respondent's employees assigned to temporary duty at the Newport Naval Shipyard were informed by their supervisor on Saturday, October 17, 1970, that the assigned work had been completed and that they should return to their home yard in Long Beach, California on Sunday, October 18. Contrary to these instructions, the employees did not return to Long Beach until October 19th and 20th, respectively. Upon returning to work, they were informed they would have to file for annual leave for work days lost. Both employees then filed grievances through the Complainant, their exclusive representative, seeking to regain their annual leave. 3/ Both grievances were processed through Steps 1 and 2 of the negotiated grievance procedure. The Respondent denied the

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2/ The Hearing Examiner, in his Report, inadvertently referred to the complaint as a "grievance."

3/ The two grievances contained the same substantive allegations. Each grievant contended that the requirement to file for annual leave on the travel day "required me to travel unnecessarily on my own time and in violation of the Federal Personnel Manual...and Article XXIII (Section I) of the negotiated agreement.... I filed the (8) hours /annual leave/ under protest.

I request that my travel voucher be revised to authorize /the work day on which I traveled/ as my official travel time and I be reinstated the (8) hours annual leave I was ordered to file for said day."

grievances at both Steps relying upon the provisions of Volume 2 of its Joint Travel Regulations, Chapter 1, Part B, Section C1051 entitled, "Exercise of Prudence in Travel," paragraph 2, which states, in part:

> Travel on an earlier or later workday to avoid travel on a non-workday or outside of scheduled hours of duty solely for the convenience of the traveler will not be the basis for extending a period of official travel for per diem allowance or other travel status purposes.

Pursuant to Article XXII 4/ of the parties' negotiated agreement, the Complainant requested and the parties mutually agreed to submit the matter to advisory arbitration. A hearing was scheduled for March 10, 1971. On March 8, 1971, the Respondent, without consultation or explanation to the Complainant, cancelled the arbitration. Subsequently, on March 19, 1971, the Respondent informed the Complainant that it was relying on OCMM Notice 12721, 5/ in concluding that the two grievances involved were not arbitrable.

The Complainant formally charged Respondent with violations of the unfair labor practice provisions of the Executive Order on March 22, 1971, and, after attempts to resolve the matter proved unsuccessful, filed the complaint in the subject case on May 19, 1971. On July 16, 1971, the Respondent, without discussion with the Complainant, requested a ruling from the General Accounting Office (hereinafter called GAO) on the matter. 6/ On September 28, 1971, the GAO issued two settlement certificates,

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4/ Article XXII, Section 1 provides: "If the Employer and the Union fail to settle any grievance processed in accordance with the Negotiated Grievance Procedure of Article XXI of this Agreement, then such grievance shall, upon written request by the party desiring arbitration, and with the written approval of the employee concerned, and by no other party or person, be referred to advisory arbitration...."

5/ OCMM Notice 12721 of November 13, 1970, provides: "Matters which are not grievable or are not within the jurisdiction of the head of the activity by virtue of established and applicable regulations . . . . shall not be subject to the grievance procedure or the arbitration process."

6/ The Respondent's request for a ruling noted that it did not authorize payment in the case and that the issues had been grieved through a negotiated procedure. It went on to say, "While the grievants in this case have been advised of their right to submit a claim to the General Accounting Office, they have declined doing so. To ensure that the Shipyard has been absolutely fair with these employees the Shipyard is, in effect, thereby filing a claim for them. Accordingly, authority is requested to make payment to them for the payment denied." (Emphasis added)

one addressed to each of the grievants. After reciting the factual basis for the claim, the letters stated, in effect, that while an extended delay in traveling, as here, would not result in additional per diem payments, the charging of leave by the Respondent under such circumstances is discretionary. 7/

The Hearing Examiner concluded that the Respondent did not violate Sections 19(a)(1), (2), (5) and (6) of the Order by unilaterally cancelling the scheduled arbitration hearing and refusing to comply with the terms and provisions of the parties' negotiated agreement. Although noting the Respondent's admitted failure to consult with the Complainant prior to the cancellation of the hearing, he found that as the matter was not arbitrable, such unilateral cancellation was not an unfair labor practice. As reasoned by the Hearing Examiner, "the dispute in question was covered by rules, regulations and laws that made implementation of any Arbitrator's Award favorable to the Union impossible.../and/ neither the Executive Order nor the Collective Bargaining Agreement required arbitration in this case." Based on a careful review of the evidence, I reject the Hearing Examiner's conclusions and recommendations in this respect.

The parties, in this matter, by agreeing to an advisory arbitration provision in their negotiated agreement, in effect, agreed to have a third party consider their disputes and make recommendations to the Activity prior to its ultimate decision. Therefore, although the Activity retained the ultimate discretion as to the disposition of the dispute, either party under the negotiated agreement was permitted to seek an arbitrator's opinion and his suggested solutions which would "advise" the Activity and aid it in reaching a decision. In my view, such an arbitration provision constitutes an invaluable tool for promoting labor relations harmony in the Federal service. 8/ If such arrangements are to be effective, however, they must be honored by the parties to the fullest extent possible. Thus, where an arbitration clause in the negotiated agreement permits either party to seek arbitration, to permit either party to the agreement to determine the question of arbitrability unilaterally would, in effect, "render useless the establishment of bilateral grievance and arbitration machinery." 9/

In the circumstances here, I find that the Respondent's conduct constituted an improper refusal to consult, confer, or negotiate with the Complainant. Thus, as noted above, the Respondent admittedly did not confer with or even notify the Complainant of its determination that an

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7/ Specifically, the letters stated:

> It has consistently been held that in performing travel necessary to his work a Government employee is required to proceed as expeditiously as he would if traveling on his own personal business even though he may be required to travel on nonwork days...
>
> Paragraph 6101(b)(2) of Title 5, United States Code provides, in pertinent part, that to the extent practicable, the head of an agency shall schedule the time to be spent by an employee in a travel status away from his official duty station within the regularly scheduled work week of the employee.
>
> It has also been held that it was not intended that the head of an agency in exercising the administrative discretion under such provision could permit a traveler under the circumstances such as here involved, to delay his return to his official headquarters until Monday after a weekend so as to increase his entitlement to per diem in lieu of subsistence. It has further been held that the charging of leave under such circumstances is a matter for administrative consideration and therefore, discretionary with the agency. /Emphasis added./
>
> Since you chose for personal reasons to extend the period of your official travel /beyond Sunday, October 18/ you are not entitled to be reinstated the 8 hours of annual leave charged for /Monday/. The record shows that you were paid per diem for Sunday, October 18, the day you were to return to your permanent duty station. Therefore, there is no additional per diem payable to you by reason of your failure to return to your headquarters on Sunday.

8/ It should be noted that the recent amendments of Executive Order 11491 included a provision that negotiated agreements must provide for a grievance procedure. Further, questions as to whether or not a grievance is on a matter subject to the grievance procedure in an agreement executed after November 24, 1971, or is subject to arbitration under that agreement may now be referred to the Assistant Secretary for decision. As this case arose under an agreement executed prior to the effective date of the amendments, such a procedure was not available to the parties in this proceeding.

9/ Veterans Administration Hospital, Charleston, South Carolina, A/SLMR No. 87.

arbitration proceeding would be fruitless prior to its unilateral cancellation of such proceeding. Instead, after agreeing under the parties' negotiated agreement to submit the matter to arbitration and scheduling the hearing, the Respondent, based on its own judgment and without consultation with the Complainant, chose to cancel the arbitration hearing. In my view, the Respondent's conduct herein falls far short of its obligation to meet and confer in good faith with the exclusive representative of its employees as required by the Order.

In the circumstances of this case and noting particularly the Respondent's improper unilateral conduct herein, I do not consider the Hearing Examiner's finding that "implementation of any Arbitrator's Award favorable to the Union /was/ impossible" to be dispositive of the matter. Moreover, the facts present herein raise a substantial doubt as to the validity of such a finding. Thus, the GAO letter set out at footnote 7 above and used by the Respondent to support its position, clearly states that it has "been held that the charging of leave under such circumstances is a matter for administrative consideration and therefore, discretionary with the agency." /Emphasis added./ Therefore, at the very least, it is arguable that at the time the Respondent cancelled the scheduled arbitration, it had the discretionary right to grant the leave requested by the grievants. And by the cancellation of the arbitration proceeding, the Respondent, in effect, prematurely exercised such discretion without the benefit of the advisory arbitration procedure contained in its negotiated agreement.

In all the circumstances, therefore, I find the Respondent's conduct herein to be in derogation of its obligation to consult, confer, or negotiate and therefore violative of Section 19(a)(6) of the Executive Order. 10/ Furthermore, I find that the Respondent's conduct constitutes a violation of Section 19(a)(1) of the Executive Order. Section 1(a) of the Order grants to each employee the right to form, join and assist a labor organization and Section 19(a)(1) prohibits agency management from interfering with that right. As in the instant case, where an activity engages in a course of conduct which has the effect of evidencing to employees that it can act unilaterally with respect to negotiated terms and conditions of employment without regard to their exclusive representative, I find that the rights of employees established under Section 1(a) of the Order have been interfered with in violation of Section 19(a)(1) of the Order.

10/ See United States Army School/Training Center, Fort McClellan, Alabama, A/SLMR No. 42, where in an analogous situation, I stated that "good faith is not demonstrated where...an activity informs the exclusive representative that a grievance has been decided, not on the basis of the undertakings of the grievance procedure, but on the activity's own personal judgments."

As I find insufficient evidence that the Respondent's conduct herein encouraged or discouraged membership in the Complainant's organization by discrimination in regard to hiring, tenure, promotion or other conditions of employment, or that the Respondent refused to accord appropriate recognition to the Complainant, I conclude that further proceedings on the 19(a)(2) and 19(a)(5) allegations contained in the complaint are unwarranted. Accordingly, I shall order that these allegations be dismissed.

CONCLUSIONS

By unilaterally cancelling an arbitration proceeding scheduled pursuant to its negotiated agreement without consulting, conferring, or negotiating with the exclusive representative, the Respondent violated Section 19(a)(6) of Executive Order 11491. By such conduct, the Respondent also interfered with, restrained, or coerced employees in the exercise of rights assured by the Order in violation of Section 19(a)(1).

THE REMEDY

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

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(a) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Long Beach Naval Shipyard shall:

1. Cease and desist from:

(a) Unilaterally cancelling arbitration proceedings scheduled pursuant to its negotiated agreement with the American Federation of Technical Engineers, AFL-CIO, Local 174.

(b) Interfering with, restraining, or coercing employees by unilaterally cancelling arbitration proceedings scheduled pursuant to its negotiated agreement with the American Federation of Technical Engineers, AFL-CIO, Local 174.

(c) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of rights assured by Section 1(a) of Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Order:

(a) Upon request, reinstate the arbitration proceeding of employees Robert Riha and Wilbur Kenny previously scheduled.

(b) Post at its facility copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Shipyard Commander 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 Shipyard 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 ten (10) days from the date of this Order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint insofar as it alleges violations of Sections 19(a)(2) and 19(a)(5) of Executive Order 11491, be, and it hereby is, dismissed.

Dated, Washington, D. C.
April 28, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED, LABOR RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT unilaterally cancel arbitration proceedings scheduled pursuant to the negotiated agreement with the American Federation of Technical Engineers, AFL-CIO, Local 174.

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, reinstate the arbitration proceeding regarding employees Robert Riha and Wilbur Kenny previously scheduled.

_____
(Agency or Activity)

Dated: _____ By _____
(Signature)

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

If employees have any question concerning this Notice or compliance with its provision, they may communicate directly with the Regional Administrator of the Labor-Management Services Administration, U. S. Department of Labor whose address is: 9061 Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

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

LONG BEACH NAVAL SHIPYARD

Respondent

and CASE NO. 72-2544

AMERICAN FEDERATION OF
TECHNICAL ENGINEERS,
AFL-CIO Local 174

Complainant

BEFORE: E. West Parkinson, Hearing Examiner

APPEARANCES: Guy H. Morley
and
Peter M. Frank, Lieutenant, JAGC,
United States Naval Reserve, Office
of Civilian Manpower Management,
Department of the Navy
Washington, D. C. 20390.

For the Respondent

Leo C. Sammon, Grand Lodge Representative,
International Association of Machinists
and Aerospace Workers, 4320 Atlantic Ave.,
Suite 3 - P.O. Box 7768, Long Beach,
California 90807.
Martin A. Rosiere, President,
AFL-CIO Local 174.
Gerald Goldman, Counsel,
Richman & Garrett, 1336 Wilshire
Blvd., Los Angeles, California 90017.

For the Complainant

REPORT AND RECOMMENDATION

In this proceeding under the provisions of Executive Order 11491, pursuant to a grievance filed with the Assistant Secretary of Labor-Management Relations dated May 19, 1971, the American Federation of Technical Engineers, AFL-CIO, Local 174 alleged that the Long Beach Naval Shipyard, a U. S. Navy facility, capriciously and unilaterally cancelled a scheduled arbitration hearing and refused to comply with the terms and provisions of their current Collective Bargaining Agreement in violation of section 19(a)(1), (2), (5) and (6) of the Order.

Pursuant to a notice of hearing dated September 16, 1971, a hearing was commenced October 5, 1971 before Hearing Examiner E. West Parkinson, of the United States Department of Labor; but a motion for a continuance to October 7 was then granted to permit discussion of a proposed settlement. At the hearing it was determined that a settlement could not be reached and the matter proceeded to full hearing. Briefs by both parties were timely filed.

The facts which are not disputed and which resulted in the grievance are as follows. Robert Riha and Wilbur Kenney were Naval Architect Technicians at the Navy facility. They, with others, were assigned temporary duty at the Newport Naval Shipyard to begin October 14 and end October 21, 1970. On October 17 they were informed by their superior that the assigned work had been completed and that they should return to Long Beach on October 18. Contrary to their instructions, Riha did not return to California until October 20 and Kenney not until October 19. Their reason which they gave for the delay was that they were required to travel on their own time. For this Riha was charged with 16 and Kenney with 8 hours annual leave by the Navy. Both employees then filed grievances through their Union seeking to regain their annual leave. By memorandum of October 28, 1970, Kenney was informed by his immediate supervisor that he had "no jurisdiction in the matter since Joint Travel Regulations and the Shipyard Travel Instruction established the policy regarding travel time." Riha received a similar decision from his supervisor. By memorandum of November 4, 1971, both employees were again informed by the Navy that "you chose to extend the period of your official travel . . . in direct contradiction to orders and the provisions of Joint Travel Regulations which provide that

> travel on an earlier or later workday to avoid travel on a non-work day or outside of scheduled hours of duty solely for the convenience of the traveler will not be the basis for extending a period of official travel for per diem allowance or other travel status purposes. See Volume 2 of the Joint Travel Regulations, Chapter 1, Part B, Section C1051 'Exercise of Prudence in Travel.'

Therefore, you did not exercise prudence in travel by delaying your return to your permanent duty station and, therefore, you correctly were charged with annual leave for the delay in reporting to work after October 18, 1970."

Whereupon, at the Union's request, after following steps (1) and (2), Article XXI of the grievance procedure, the matter was set by agreement of both parties for arbitration on March 10, 1971. On March 8, 1971, it was determined by the Navy that it did not have the authority to implement an arbitrator's award if he should rule in favor of the employees since it would be contrary to federal regulations, Navy instructions and law. Thereafter, the Navy, by notice of March 8, 1971, without consultation with the Union, cancelled the scheduled arbitration hearing.

The sole issue here is whether the matter was arbitrable and whether there was an unfair labor practice. In my opinion, if the matter was not arbitrable the unilateral cancellation of the arbitration proceedings was not an unfair labor practice.

It is the Navy's position that even though there was no consultation prior to the cancellation of the scheduled arbitration hearing, such omission is a mere mechanical failure and there was no intention "to flaunt the law." It is argued that Executive Order 11491 was never intended to require consultation and conferral when such actions would amount to an exercise in futility and nothing would be gained thereby. Furthermore, the Navy points out that the collective bargaining agreement between the respondent and claimant expressly provides that such agreement is made in accordance with the provisions of Executive Order 11491. Section 12 of the Order provides in part:

> a. in the administration of all matters covered by the agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher level; (Emphasis supplied.)

Also, Title 31 U.S. Code, section 71 provides:

> All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as a debtor or a creditor, shall be settled and adjusted in the General Accounting Office.

Riha and Kenney made a claim for pay based on a work status as opposed to an annual leave status against the Navy. Such claim, as seen, must go to the General Accounting Office for final resolution. The General Accounting Office has held that a delay in the period of one's official travel for personal reasons cannot be considered hours of employment for per diem or pay purposes. See 31 Comp. Gen. 278. Indeed, in the case at bar, the General Accounting Office rendered an opinion holding that Riha and Kenney must take the annual leave. Thus, since the issue in dispute is clearly one governed by law and regulation, and since a claim against the Government is involved, the Navy had no alternative but to remove the matter from the arbitration process.

Finally, OCMM Notice 12721 of November 13, 1970 provides in relevant part: Matters which are not grievable or are not within the jurisdiction of the head of the activity by virtue of established and applicable regulations, or provisions of Executive Order 11491, shall not be subject to the grievance procedure.

It is the Union's position that the Navy violated sections 19(a)(1), (2), (5), and (6) of the Executive Order. Also, it is argued by the Union that whether the matter was arbitrable is not an issue here. In addition, it is stated that the unilateral cancellation of the scheduled arbitration was a violation of the Collective Bargaining Agreement. In my opinion this position should be rejected.

It seems obvious that further negotiation on the matter or further pursuit of the grievance procedure to arbitration would have been useless. It seems reasonable to conclude that the Executive Order was never intended to require arbitration in a situation such as this. Clearly the dispute in question was covered by rules, regulations, and law that made implementation of any Arbitrator's Award favorable to the Union impossible. Therefore, it is concluded that neither the Executive Order nor the Collective Bargaining Agreement required arbitration in this case. See American Stores Company v. Johnston, 171 F.Supp. 275 (USDC, S.D.N.Y., 1959); also see Comptroller General Decision B-163422 (April 8, 1971) and B-172671 (June 14, 1971).

It is recommended that the complaint be dismissed.

E. West Parkinson
Hearing Examiner

Dated at Washington, D. C.
this 8th day of December, 1971.

May 8, 1972

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

DEPARTMENT OF THE NAVY,
NAVAL AIR REWORK FACILITY,
JACKSONVILLE, FLORIDA
A/SLMR No. 155

This case involves a complaint filed by the National Association of Government Employees (Complainant) against the Department of the Navy, Naval Air Rework Facility, Jacksonville, Florida (Respondent) alleging violations of Section 19(a)(1) and (3) of the Order. The basis of the complaint was that Respondent had extended a negotiated agreement with the International Association of Machinists and Aerospace Workers, Naval Air Lodge 1630 (Incumbent), at a time when a valid question concerning representation was pending. Respondent stated it had extended the agreement pursuant to a Department of Defense directive. Complainant further alleged the directive violated the Order. The case was before the Assistant Secretary based on a stipulation of facts, issues and accompanying exhibits submitted by the parties.

Noting that continuity and stability in a collective bargaining relationship is desirable, the Assistant Secretary considered it to be reasonable and proper that parties be permitted to extend, in writing, an agreement while awaiting resolution of a representation question, if the granting of the extension occurs during the term of the parties' existing agreement. In the subject case, however, the evidence established that the granting of the extension of the agreement occurred after the termination of the parties' existing agreement. The Assistant Secretary viewed such conduct as, in effect, entering into a new agreement with the incumbent and bestowing upon it specific rights and privileges which had terminated when the prior agreement expired. He noted that under normal circumstances, the Respondent's execution of a "new retroactive agreement" with the incumbent at a time when a valid question concerning representation was pending would constitute interference with employee rights and improper assistance in violation of Section 19(a)(1) and (3) of the Order. However, in the particular circumstances of this case, including the fact that the underlying representation issue has been resolved with the Complainant being certified as the exclusive representative of the employees involved, the Assistant Secretary found the questions of interference and improper assistance to a labor organization had been rendered moot. In his view, it would not effectuate the purposes of the Order to find a violation where, as here, the improperly assisted labor organization has been displaced by the Complainant and there is no evidence that the Respondent's conduct was motivated by anti-union considerations.

With respect to the DOD directive, the Assistant Secretary found that it was not violative of the Order because it could be interpreted consistent with the policy established in this case.

In view of the above, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

A/SLMR No. 155

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

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

Respondent

and

Case No. 42-1536 (CA)

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES

Complainant

and

NAVAL AIR LODGE 1630, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Party to the Agreement

DECISION AND ORDER

This matter is before the Assistant Secretary pursuant to Regional Administrator J. Y. Chennault's July 7, 1971 Order Transferring Case to the Assistant Secretary of Labor under Section 205.5(a) of the Regulations. Upon consideration of the entire record in the subject case, which includes the parties' stipulation of facts, issues and accompanying exhibits and briefs filed by all parties, I find as follows:

In a letter dated January 26, 1971, 1/ the Complainant filed an unfair labor practice charge pursuant to Section 203.2 of the Regulations, wherein it was contended that the Respondent violated Section 19(a)(1) and (3) of Executive Order 11491 by extending its collective bargaining agreement with Naval Air Lodge 1630, International Association of Machinists and Aerospace Workers, AFL-CIO, herein called IAM, at a time when a question concerning representation existed. By letter dated March 1, Respondent's Commanding Officer replied that he had extended the negotiated agreement in accordance with Department of Defense Directive (DOD) No. 1426.1, Section VII, D.2.1. which states, in part:

> Where a timely and valid challenge to an exclusively recognized labor organization is filed not more than 90 and not less than 60 days prior to the terminal date of a negotiated agreement and either of the parties to the agreement has requested renegotiation, the head of the DOD activity concerned may agree in writing with the exclusively recognized organization to extend the existing agreement for such period beyond the original termination date of the agreement during which the challenge remains unresolved,---. (Emphasis added)

The Complainant subsequently filed an unfair labor practice complaint against the Respondent alleging violations of Section 19(a)(1) and (3) of the Order based on the Respondent's alleged improper extension of its collective bargaining agreement with the IAM. Such agreement covered employees, who, as noted below, selected the Complainant in a secret ballot election held on December 17, 1970.

The record reveals that on June 13, 1963 the Respondent granted exclusive recognition to the IAM in a unit composed of all nonsupervisory ungraded employees of the Respondent. The parties' first negotiated agreement was consummated on January 20, 1964; their most recent agreement, which was executed on December 23, 1968, had an expiration date of December 23, 1970.

A petition for Certification of Representative was filed by a local of the Complainant on or about October 22, 1970, covering the employees represented by the IAM. On November 27, 1970, Respondent, Complainant's local and the IAM executed a Consent Agreement for an election which was held subsequently on December 17, 1970. In the election, the Complainant's local received 887 votes and the IAM received 619 votes. Thereafter, the IAM filed objections to the election alleging certain improper conduct which it contended affected the results of the election.

On April 30, 1971, 2/ the Regional Administrator issued a Report and Findings concerning the IAM's objections holding that no improper conduct

1/ Unless otherwise indicated, all dates occurred in 1971.

2/ The parties' stipulation fixed this date as April 30, 1970, but the record is clear that April 30, 1971 was the intended date.

occurred affecting the results of the election and, accordingly, he notified the parties that a Certification of Representative for Local R6-82, National Association of Government Employees would be issued by him, absent the timely filing of a request for review with the Assistant Secretary. A timely request for review subsequently was filed by the IAM on or about May 11, 1971. 3/

By letter dated December 23, 1970, the date the Respondent's negotiated agreement with the IAM expired, the latter requested extension of its agreement until such time as the Department of Labor issued a certification in the representation case. On January 6, 1971, the Commanding Officer of the Respondent agreed to continue to abide by the provisions of the agreement for a period of thirty days from its expiration date. Subsequently, the IAM made requests, on a monthly basis, for further extensions of its negotiated agreement with the Respondent and the Commanding Officer of the Respondent responded that the Respondent would continue to abide by all the provisions of the agreement and would continue to extend such agreement on a monthly basis until a Certification of Representative was issued by the Department of Labor. It is undisputed that neither the Respondent nor the IAM sought to negotiate a new agreement or made proposals for a new agreement subsequent to Complainant's local's filing of its representation petition.

The parties indicated in their stipulation and briefs that they desired the following issues to be considered in this matter:

1. By continuing to recognize the IAM as the exclusive representative of the employees in the unit described above, and by extending and abiding by all of the terms of the parties' negotiated agreement, until the Department of Labor issued a Certification of Representative, has the Department of the Navy and the Naval Air Rework Facility, Jacksonville, Florida, interfered with, restrained, or coerced employees in the exercise of rights assured to them by Executive Order 11491 in violation of Section 19(a)(1) of the Order, or sponsored, controlled, or otherwise assisted the IAM in violation of Section 19(a)(3) of the Order?

2. Does Department of Defense Directive 1426.1, Section VII, D.2.1., issued March 26, 1970, violate Section 19(a)(1) and 19(a)(3) of Executive Order 11491?

3/ Subsequent to the submission of the stipulation in this case to the Assistant Secretary, the request for review concerning the IAM's objections to the election was denied and a Certification of Representative was issued by the appropriate Area Administrator to Local R6-82, National Association of Government Employees.

All of the facts set forth above are derived from the parties' stipulation of facts, issues and accompanying exhibits.

The first issue presented involves the relationship between the Respondent Activity and the incumbent labor organization at a time when a valid rival claim for representation was pending. The resolution of this issue necessarily requires the striking of a balance between two paramount and somewhat conflicting considerations. Thus, on the one hand, it is desirable that agencies should remain neutral during the pendency of such rival claim and refrain from negotiating with the incumbent exclusive representative. On the other hand, where a labor organization has been representing exclusively an agency's employees, stability in labor-management relations, a primary objective of the Order, is achieved best through an uninterrupted continuation of the collective bargaining relationship even during the existence of an attempt to unseat the incumbent.

In order to strike a balance between the two above-mentioned considerations, it is my view that the desired neutrality by an agency must be judged by its maintenance of the status quo pending resolution of the representation question, rather than by the identical treatment of the labor organizations involved. Thus, although agencies should maintain neutrality during the pendency of a valid question concerning representation raised by the filing of a petition, at the same time, an agency should not infringe upon the rights of an incumbent labor organization to administer its agreement. Nor should the incumbent be prohibited from maintaining the existing terms and conditions of employment contained in the agreement. A contrary policy, in effect, would create a vacuum in which the employees would not be covered by any agreement, notwithstanding the desire of the agency and the incumbent labor organization to continue the agreement. In this connection, while I view the filing of a petition as raising a question concerning representation, there continues the presumption that the incumbent labor organization does, in fact, represent a majority of the employees in the unit. The subsequent certification may sustain or refute that presumption.

I believe that by requiring an agency to maintain its neutrality, but at the same time permitting the incumbent exclusive representative to administer its negotiated agreement, a desired stability is attained during that period of controversy and, at times, confusion while a representation question is pending. Thus, I do not find the continuance of a pre-existing collective bargaining relationship between an incumbent labor organization and an agency prior to a determination of a rival claim to constitute interference, restraint, or coercion with respect to employee rights assured by the Order or improper assistance to the incumbent labor organization. Nor do I find that such conduct encroaches upon the right of the employees to change their exclusive bargaining representative. In this

connection, I view the granting by an agency of a written extension of the termination date of an existing negotiated agreement during the term of that agreement, in order to avoid a lapse in existing terms and conditions of employment contained in the agreement while awaiting resolution of a representation question, to be reasonable, proper and consistent with the desired stability discussed above. In making this determination, I note particularly that such extensions generally will be of short duration and, on balance, any limited advantage bestowed upon the incumbent by such extension would be far outweighed by the stabilizing effect obtained for unit employees.

On the other hand, where an agency enters into negotiations for a new agreement with an incumbent labor organization at a time when a valid question concerning representation is pending, in my view, the desired neutrality would be breached. Thus, the harm created is inherent in such bargaining for it is through bargaining that the incumbent may receive new benefits for unit employees which clearly would improperly enhance the status of the incumbent and influence the employees' free choice.

As noted above, the alleged violation in the subject case pertains to the Respondent's extension of its negotiated agreement with the IAM on January 6, after the expiration of that agreement occurred on December 23, 1970 and at a time when a valid question concerning representation was pending. As discussed above, I do not view the extension of an existing negotiated agreement between an incumbent labor organization and an agency, prior to a resolution of a rival claim, to constitute improper assistance to the incumbent or to encroach upon the rights of the employees if such extension is agreed upon in writing during the term of the parties' existing agreement. However, where the agreement has been allowed to expire by its own terms, different considerations must be examined. Thus, with the expiration of the parties' agreement in the subject case, those rights and privileges enjoyed by the IAM which were based solely on the existence of an agreement - e.g., checkoff privileges - in effect, terminated. By permitting its negotiated agreement to terminate and later deciding to extend retroactively its previously expired agreement, the Respondent, in effect, entered into a new agreement with the IAM and bestowed upon it certain rights and privileges which had terminated when the previous agreement expired. I view the resulting improper effect to be the same as if the parties had negotiated and signed a new agreement at that time. Accordingly, under normal circumstances, the Respondent's execution of this "new retroactive agreement" with the IAM at a time when a valid question concerning representation was pending would be considered to constitute interference with employee rights and improper assistance to a labor organization in violation of Section 19(a)(1) and (3) of the Order.

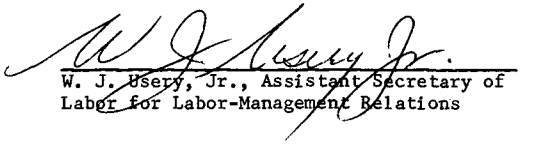
However, in the particular circumstances of this case, including the fact that the underlying representation issue has been resolved with the Complainant being certified as the exclusive representative of the employees involved, I find that the questions of interference and improper assistance have been rendered moot. Thus, in my view, it would not effectuate the purposes of the Order to find a violation, where, as here, the improperly assisted labor organization has been displaced by the Complainant and there is no evidence that the Respondent's conduct was motivated by anti-union considerations. Accordingly, I shall order that the complaint be dismissed insofar as it alleges a violation of Section 19(a)(1) and 19(a)(3) based on the extension of an agreement at a time when a valid question concerning representation was pending.

With respect to the second issue raised by the parties, I find, in the circumstances of this case, that DOD Directive No. 1426.1, Section VII, D.2.1. is not violative of the Order. Thus, in its present form, the Directive can be construed as allowing an extension of an agreement prior to the expiration of such agreement. As stated above, I view an extension of a negotiated agreement during the pendency of a valid question concerning representation to be proper where the parties agree to a written extension during the term of their existing agreement. As the Directive is not inconsistent with this rationale, I find that there is no basis for concluding that it is violative of the Order.

ORDER

Pursuant to Section 6(a)(4) of Executive Order 11491 and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations, hereby orders that the complaint in Case No. 42-1536 (CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
May 8, 1972



W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

May 9, 1972

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

DEPARTMENT OF AGRICULTURE
FOREST SERVICE,
SIERRA NATIONAL FOREST
A/SLMR No. 156

This case arose as the result of a representation petition filed by the American Federation of Government Employees, Local 3198, AFL-CIO, (AFGE) seeking a unit of all Wage Board and General Schedule employees of the Sierra National Forest assigned to duty stations outside of the Supervisor's Office. The Activity took the position that the only appropriate unit would include all employees of the Forest.

The Assistant Secretary found that a unit composed solely of employees assigned to duty stations outside of the Supervisor's Office, as proposed by the AFGE, was not an appropriate unit for the purpose of exclusive recognition. In reaching this determination, he noted that both Supervisor's Office employees and employees assigned to duty stations in the Ranger Districts are covered by a centrally administered personnel program, including Forest-wide consideration in promotions and posting of vacancies. Further, he noted that the employees of the Supervisor's Office and the Ranger Districts share similar skills, perform similar duties, have frequent on-the-job contact and that there have been a number of transfers between the Supervisor's Office and the Districts. In the Assistant Secretary's view, such a fragmented unit could not be expected to promote effective dealings and efficiency of agency operations.

Accordingly, he ordered that the petition be dismissed.

500-836 O - 73 - 17

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF AGRICULTURE
FOREST SERVICE,
SIERRA NATIONAL FOREST 1/

Activity

and Case No. 70-2368

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3198, AFL-CIO

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Carol A. Philipps. 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:

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

2. The Petitioner, American Federation of Government Employees, Local 3198, AFL-CIO, herein called AFGE, seeks an election in a unit of all Wage Board (WB) and General Schedule (GS) employees of the Sierra National Forest assigned to duty stations outside of the Supervisor's Office including professionals, excluding supervisors, guards,

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

employees assigned to the Supervisor's Office, part-time summer hire employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and management officials.

The AFGE takes the position that employees of the Sierra National Forest outside of the Supervisor's Office constitute a functionally distinct unit and share a separate community of interest due to the fact that they perform physical labor in implementing Forest programs, while Supervisor's Office employees primarily are concerned with planning and training functions. The Activity takes the position that a unit composed of all employees of the Sierra National Forest would comprise the only appropriate unit. Such a unit, in the Activity's view, would provide economical and efficient management, thus promoting effective dealings and efficiency of operations.

The mission of the Forest Service of the Department of Agriculture is to conserve and utilize the resources of the National Forests. The Sierra National Forest encompasses 1,500,000 acres of National Forest land and is divided into 6 Ranger Districts. 2/ The Forest Supervisor's Office, which is located in Fresno, California, is responsible to the Regional Forester's Office for the direction, coordination and control of the Ranger Districts in the Sierra National Forest. The Ranger Districts of the Forest, each under the management of a District Ranger, constitute the basic working unit of the Activity. In the Sierra National Forest there are approximately 220 permanent employees. The unit petitioned for includes some 68 of the approximately 104 permanent employees who are assigned to duty stations outside of the Supervisor's Office. 3/ Additionally, during the hearing the parties stipulated that they would include in the proposed unit a number of "temporary" employees who are hired during the summer and fall months to assist the permanent employees. 4/

The record reflects that the personnel management program for the Sierra National Forest, covering both the Supervisor's Office and the Ranger Districts, is administered centrally in the Supervisor's Office by the Personnel Officer in conjunction with the Forest Supervisor. In this respect, the Forest Supervisor has been designated as the Employment Officer for the Forest for GS-9 positions and below and for all WB positions. This authority, in turn, has been redelegated to the Personnel Officer. 5/ The record reflects that the area of consideration for promotion is Forest-wide for grades above GS-4 and WG-3 and that job vacancies are posted on a Forest-wide basis. Moreover, the Forest Supervisor has the final authority for approving promotions.

Many employees of the Supervisor's Office and the Ranger Districts share similar skills and perform similar duties. 6/ In addition, the evidence establishes that employees of the Supervisor's Office and of the Ranger Districts work under the same pay and leave schedules, are provided the same travel allowances and insurance benefits, and operate under the same incentive awards system. The record indicates that there have been a number of transfers of employees between the Supervisor's Office and the Ranger Districts either by way of lateral transfers or promotions. Furthermore, there is considerable contact and interaction between employees in the Supervisor's Office and those in the various Ranger Districts. In this connection, the record reveals that many of the programs of the Forest involve a coordinated effort by all of the employees of the Activity. Thus, Ranger District employees, working in conjunction with Supervisor's Office employees, formulate Activity-wide fire control programs; summer youth programs are implemented jointly by employees from both the Supervisor's Office and the Ranger Districts; Supervisor's Office employees frequently visit the Ranger Districts to provide functional assistance and guidance and to inspect the work of District employees; employees from the Supervisor's Office substitute for absent District employees; and Regional training sessions are attended by a combined group of Supervisor's Office and Ranger District employees.

Based upon a consideration of all the factors described above, I find that the employees in the petitioned for unit do not possess a clear and identifiable community of interest separate and apart from other employees of the Activity. In reaching this determination, I note particularly that the Activity has a centrally administered personnel program, including Forest-wide consideration for promotions above GS-4 and WG-3 and Forest-wide posting of vacancies. Further, there are similar employee

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2/ Although there was some testimony that there are 5 Ranger Districts in the Sierra National Forest, the evidence indicated that there are, in fact, 6 Ranger Districts.

3/ The remaining 36 employees of the Ranger Districts have been designated as supervisors in an exhibit entered at the request of the Hearing Officer. In addition, the parties stipulated the job classifications they considered to be "professional" in nature.

4/ The Activity, as of September 18, 1971, employed 118 such employees.

5/ Limited hiring authority has been redelegated to certain employees in the various Districts for temporary employees, GS-5 and below, and for WB employees.

6/ The record reveals that a number of job classifications, e.g., Forestry Technician, Forester, Clerk-Typist, and Personnel Clerk, are common to both the Supervisor's Office and the Ranger Districts.

job classifications and duties in both the Forest Supervisor's Office and the Ranger Districts and there have been transfers between the Districts and the Forest Supervisor's Office. Also, the evidence shows frequent interaction between District and Forest Supervisor's Office employees. In these circumstances, and noting that such a fragmented unit could not reasonably be expected to promote effective dealings and efficiency of agency operations, I find that the unit petitioned for by the AFGE is not appropriate. Accordingly, I shall order that its petition be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 70-2368, be, and it hereby is, dismissed.

Dated, Washington, D. C.
May 9, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

May 11, 1972

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

U. S. ARMY TRANSPORTATION CENTER,
FORT EUSTIS, VIRGINIA
A/SLMR No. 157

The subject case involved a hearing on Objections to an Election which were filed by Local 1643, American Federation of Government Employees, AFL-CIO, (AFGE), to a runoff election between it and Local R4-6 National Association of Government Employees, (NAGE).

Upon review of the Hearing Examiner's Report and Recommendations and the entire record in the case, the Assistant Secretary adopted the Hearing Examiner's recommendations and overruled the objections, based on the fact that the AFGE failed to meet the burden of proof of sustaining its objections as required by Section 202.20(d) of the Regulations of the Assistant Secretary. The Assistant Secretary noted that in the circumstances, the presence of a NAGE official at two polling places for a limited period of time did not improperly affect the results of the election in the absence of any evidence that the NAGE official spoke to prospective voters or otherwise engaged in any improper campaigning or electioneering conduct. He noted also that the NAGE official did not wear any form of union or personal identification and that he was not requested to leave the polling areas by the parties' observers.

A/SLMR No. 157

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. ARMY TRANSPORTATION CENTER,
FORT EUSTIS, VIRGINIA

Activity

and

Case No. 46-1745(RO)

LOCAL R4-6 NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES

Petitioner

and

LOCAL 1643, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Intervenor

DECISION ON OBJECTIONS

On December 13, 1971, Hearing Examiner Frank H. Itkin issued his Report and Recommendations in the above-entitled proceeding, finding that Local 1643, American Federation of Government Employees, AFL-CIO, herein called AFGE, failed to sustain its burden of proof with respect to Objections 4 and 5, and recommending that the objections be overruled.

The Assistant Secretary has reviewed the rulings of the Hearing Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Hearing Examiner's Report and Recommendations and the entire record,1/ I adopt the findings and recommendations of the Hearing Examiner.

1/ Both the AFGE and Local R4-6 National Association of Government Employees, herein called NAGE, filed post-hearing briefs.

With respect to Objection 4 of the AFGE concerning, among other things, certain alleged improper conduct occurring in voting areas, as set forth in the Hearing Examiner's Report and Recommendations, the credited testimony disclosed that on the day of the election, employee Glen Zimmerman, who is also a vice-president of the NAGE Local R4-6, made unauthorized visits to two polling places. At polling place No. 2, where he was not on the list of eligible voters, Zimmerman spent a total of approximately 30 minutes in the area and engaged in general conversations with the election observers, and had a private conversation with the NAGE observer. The evidence revealed that Zimmerman was present in this polling place during periods when eligible voters went through the process of casting their ballots, but did not engage any voter in conversation. The evidence revealed also that at polling place No. 3, where Zimmerman was on the list of eligible voters, he appeared on two occasions, again engaging in general conversation with the election observers and a private conversation with the NAGE observer. However, as in the case of polling place No. 2, Zimmerman did not converse with any prospective voters during his visits to polling place No. 3. The credited testimony established further that Zimmerman did not wear any form of union or personal identification and was not asked by any election official to leave either polling area.

In the particular circumstances of this case, and in agreement with the Hearing Examiner, I find that Zimmerman's conduct in this matter would not warrant setting aside the election. Thus, the evidence establishes that while Zimmerman made unauthorized visits to polling places Nos. 2 and 3 during the conduct of the election, there is no evidence that he engaged in conversation with any voters or engaged in any other campaigning or electioneering activity.

The AFGE contends that Zimmerman's conduct herein violated the principles set forth in the Procedural Guide for Conduct of Elections Under Supervision of the Assistant Secretary Pursuant to Executive Order 11491, wherein it states that,

> "Neither supervisors, managerial employees, nor labor organization officials should be in or near the polling place while the election is being conducted. Only official observers and voters may be in the voting place during the election."

While I have stated previously that this language reflects a policy which I have adopted to provide, to the greatest possible extent, those conditions which would best enable employees to register a free and untrammeled choice for or against a labor organization 2/, it is my view

2/ See United States Department of Agriculture, Agricultural Stabilization and Conservation Service, A/SLMR No. 137.

that such policy must be applied on a case by case basis. Thus, in accordance with Section 202.20(d) of the Assistant Secretary's Regulations, the objecting party bears the burden of proof regarding all matters alleged in its objections to conduct affecting the results of the election. In my view, the deviation from the above-noted standards, as established by the evidence in this case, does not sustain the prescribed burden of proof provided for in the Regulations. In this connection, as noted above, no evidence was presented that Zimmerman spoke to prospective voters at the polling places in the limited time he was present at those locations or otherwise engaged in any improper campaigning or electioneering conduct which could have affected the results of the election. Nor did he wear any form of union or personal identification, or was he requested to leave the polling areas by the parties' observers. 3/

In these circumstances, I adopt the recommendation of the Hearing Examiner to overrule Objection 4.

Further, in view of the credited testimony and other evidence presented, I adopt the recommendation of the Hearing Examiner to overrule Objection 5 on the grounds that the evidence fails to establish any misconduct on the part of the NAGE observers at polling place No. 4.

ORDER

IT IS HEREBY ORDERED that the objections to the election in the above-entitled proceeding be, and they hereby are, overruled, and the case is returned to the appropriate Regional Administrator for final action.

Dated, Washington, D. C.
May 11, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

3/ In this connection, my decision in United States Department of Agriculture, Agricultural Stabilization and Conservation Service, cited above, was considered distinguishable. Thus, in that case on the day prior to the election a supervisor of the Activity made statements to employees in the claimed unit which reasonably could be expected to affect their freedom of choice in the election. Further, on the day of the election the same supervisor made statements in the polling area and in the presence of voters which, similarly, could reasonably be expected to affect their freedom of choice in the election.

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

U. S. ARMY TRANSPORTATION CENTER,
FORT EUSTIS, VIRGINIA,

Activity

and

LOCAL R 4-6 NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES,

Petitioner

and

LOCAL 1643, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO,

Intervenor.

CASE NO. 46-1745(RO)

Captain Richard K. Clark, Esquire
Assistant Staff Judge Advocate,
U. S. Army Transportation Center,
Fort Eustis, Virginia, on behalf
of the Activity.

Roger P. Kaplan, Esquire
Assistant General Counsel, National
Association of Government Employees,
Suite 512, 1341 G Street N. W.
Washington, D. C., on behalf of
Petitioner NAGE.

Neal H. Fine, Esquire
Assistant to the Staff Counsel,
American Federation of Government
Employees, AFL-CIO
400 First Street N. W.
Washington, D. C., on behalf of
Intervenor AFGE.

Before, Frank H. Itkin, Hearing Examiner

REPORT AND RECOMMENDATIONS

Statement of the Case

This proceeding arises under Executive Order 11491. Pursuant to an Agreement for Consent Election executed by the parties, two representation elections were conducted under the supervision of the Area Administrator for Labor-Management Services Administration, United States Department of Labor, on August 5 and August 26, 1970. The first election did not produce a majority voting for any selection. Thereafter, a run-off election was conducted with Petitioner Local R4-6, National Association of Government Employees (herein, "NAGE") and Intervenor Local 1643, American Federation of Government Employees, AFL-CIO (herein, "AFGE"), appearing on the ballot. Upon completion of the balloting in the run-off election, the parties were furnished with a tally of ballots, which showed:

* * *

Approximate number of eligible voters	1074
Void Ballots	4
Votes Cast for NAGE, Local R4-6	323
Votes Cast for AFGE, Local 1643	317
Valid Votes Counted	640
Challenged Ballots	0
Valid Votes Counted plus Challenged Ballots ...	640

* * *

Intervenor AFGE filed 12 objections to the conduct of the run-off election. Subsequently, on December 23, 1970, the Philadelphia Regional Administrator for Labor-Management Services Administration issued his Report On Objections To Election, dismissing all 12 objections. On April 30, 1971, the Assistant Secretary of Labor determined "upon a full review of the evidence submitted and positions taken by the parties * * * that the dismissal of Objections 1, 2, 3, 6, 7, 8, 9, 10, 11 and 12 by the Regional Administrator was **warranted.** With respect to Objections 4 and 5, * * * the appeal raises issues which can best be resolved on the basis of record testimony." As a result, the Regional Administrator issued a notice of hearing on June 4, 1971, as amended on July 26, 1971, concerning Objections 4 and 5. The hearing was conducted before me on August 10, 1971, at Fort Eustis, Virginia. All parties were represented by counsel, who were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, submit oral argument and file briefs.

Upon the entire record in this matter, from my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by Petitioner NAGE and Intervenor AFGE, I make the following findings and conclusions:

FINDINGS OF FACT

I. Contentions of the parties

AFGE argued at the hearing that "two severe violations in the conduct of the election of August 26, 1970 * * * occurred; namely, that the Vice President of NAGE visited two voting booths improperly and talked to observers at the voting booths; and, second, that NAGE had both an observer and an alternate observer standing at one booth for an entire day." AFGE further argued "that these are serious violations of the Assistant Secretary's Guide for the Conduct of Elections and, accordingly, in view of the closeness of the election, a new election should be ordered by the Assistant Secretary." In its post-hearing brief, AFGE asserts:

> The issue presented is whether the violations of the Assistant Secretary's Procedural Guide for Conduct of Elections cited by [AFGE] in objections number four and five are of sufficient degree as to warrant setting aside the August 26, 1970 election.

At the hearing, NAGE contended: "the fact that the votes in this election were close [is] no basis [for] determining that there were irregularities in the voting process"; "[t]here has been no evidence * * * that any individual conversed with voters * * * no such conversations did exist between observers of [NAGE] and officials of [NAGE] and voters in the election." In its post-hearing brief, NAGE also argues that a violation of the Assistant Secretary's Procedural Guide for Conduct of Elections does not, in and of itself, warrant setting aside a representation election; no evidence was adduced to substantiate AFGE's claim that a NAGE observer and alternate worked polling place No. 4 simultaneously or that AFGE was prejudiced by such alleged conduct; and no evidence was presented that a NAGE official campaigned at polling places No. 2 and No. 3 or that AFGE was prejudiced by a NAGE official allegedly visiting the polls.

The Activity stated its position at the hearing, as follows: AFGE has not sustained "the burden of proof" with respect to its objections; "* * * there hasn't been any evidence * * * that shows improper conduct during the election, nor does it show improper conduct affecting the results of the election." The Activity further stated: "these arguments would hold forth * * * even if there were a violation of the Procedural Guide * * *."

The relevant evidence is summarized below:

II. Objection No. 4: "NAGE officials campaigning at two polling places"

A. The testimony pertaining to Objection No. 4

Elsie J. Williams served as an observer for the Activity in the run-off election conducted on August 26, 1970. She worked at polling place No. 2 from about 9:45 a.m. to 12:30 p.m. and from about 2:30 p.m. to 4:30 p.m. Other observers on duty with her were Allan M. Pugh, for NAGE, and Phillip Lovett, for AFGE. 1/ Williams recalled that about 11:30 a.m. an employee of the Activity -- then unknown to her and later identified as Glen Zimmerman, Vice President of NAGE -- came into her polling place and conversed with observer Pugh. As Williams explained: "He came in and I believe he approached Mr. Pugh and conversed with him for a couple of minutes." 2/ No voters entered the polling place while Zimmerman spoke with Pugh. Neither Williams nor the AFGE observer requested Zimmerman to leave the polling area. At the close of balloting, Williams, together with the other two observers, signed a Certification On Conduct Of Election, which stated:

* * *

> The undersigned acted as official observers in the conduct of the balloting [at voting Place No. 2 on August 26, 1970] * * *. We hereby certify that such balloting was fairly conducted, that all eligible voters were given an opportunity to cast their ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote.

* * *

Phillip Lovett testified that he served as an observer for AFGE at polling place No. 2 on August 26 from about 8:30 a.m., when the poll opened, until 1 p.m., when he went to lunch, and from about 2:00 p.m. until 4:30 p.m. Lovett was at the polling place at all times except during his lunch break. He recalled that Glen Zimmerman came into his polling place shortly after 11 a.m.; that Zimmerman was not on the list of eligible voters for that polling place; and that Zimmerman engaged in "general conversation" with the officials present in the room. Lovett testified: "Well, actually, he was talking to all of us, you know, general conversation * * *" while "stand[ing] in front of the table." Lovett added: Zimmerman "stood back when the voters were in" the room and, after the voters left and "there were no voters in this room", he conversed with Pugh. Lovett could not hear the conversation between Pugh and Zimmerman. 3/ Lovett recalled that Zimmerman was present in the room about 30 or more minutes although Zimmerman's conversation with Pugh consumed only "a few minutes." 4/ Lovett signed the Certification executed by the other two observers. Although Lovett acknowledged, in response to questioning, "nobody explained to [him] what this meant, this certification," he also testified that he had attended a 1-hour meeting explaining his roll as election observer.

Allan M. Pugh testified that he was an observer at polling place No. 2 for NAGE. He related that "prior to signing" the Certification On Conduct Of Election,

> the Civilian Personnel Officer and his assistant asked the three [observers] if we were satisfied with everything; that it was conducted fairly and squarely, and everything went off like it was supposed to be, and we all said yes, it was very smooth.

As for Zimmerman's visit to polling place No. 2, Pugh testified:

> There were no voters in the room at the time Mr. Zimmerman came in. He came in and asked me if I wanted any relief, or something to that effect. I told him no * * *. [H]e asked everybody.

Pugh recalled that both unions' alternates "came in and wanted to know if everything was all right. Both observers for both unions." Pugh approximated Zimmerman's visit to his polling place as between 5 to 10 minutes. Pugh could not "recall" Zimmerman talking privately with him that day. Pugh also testified that he did not record separately or privately the number of votes cast or remaining to be cast during the balloting. Pugh was relieved at lunch time, between 12:30 and 1 p.m.

Calvin Wishart served as an observer for the Activity at polling place No. 3. on August 26 from about 12:30 p.m. until 4 p.m. He could not "recall" Zimmerman entering the polling place while he was

1/ Prior to Williams' arrival at her polling place and later during her lunch break, a Miss Taylor served as observer for the Activity.
2/ On cross-examination, Williams restated: "To the best of my recollection, it was only a couple or three minutes."

3/ The room involved was about 72 by 50 feet; Pugh and Zimmerman conversed about 15 feet from the witness.
4/ Lovett explained: Zimmerman spoke to the officials at the table 10 or 15 minutes "at one time"; Zimmerman "departed at one time and came back, I don't know whether to get coffee or what"; and "there were no voters in there" for the "few minutes" Zimmerman spoke with Pugh. Zimmerman did not wear any union button or identification during his visit to the polling place.

on duty. Wishart testified that a Mrs. Smith acted as observer for the Activity before he started that day and later relieved him about 4 p.m.; that no unusual or improper conduct occurred while he was on duty; that a Mrs. Daniels and a Mrs. Rowe took turns acting as observer for NAGE and a Mrs. Webb acted as observer for AFGE.

Marilyn S. Webb served as an observer for AFGE at polling place No. 3 on August 26 from about 9:30 a.m. until 10 a.m., and from about 12:30 p.m. until 4 p.m. She testified that Peggy Daniels was an observer for NAGE; Calvin Wishart was an observer for the Activity; a Mrs. Rowe was an alternate observer for NAGE; and a Mr. Bingham was an alternate observer for AFGE. She recalled that Zimmerman entered her polling place twice that day. During one visit, Zimmerman spoke to Peggy Daniels. As Webb testified:

> * * * when he came in, first he just had a casual conversation and then he asked her [Daniels] to come to the back of the room and they had a conversation in the back.

Zimmerman's conversation with Daniels, according to Webb's testimony, took "maybe two, three or four minutes, something like that," and there were no voters in the room while Zimmerman spoke with Daniels. After this conversation, Zimmerman assertedly "stood around the table for a few minutes longer; maybe five or ten minutes longer" and then he left. 5/ Webb could not "recall" what Zimmerman said to the officials at the table. Zimmerman's assigned voting place was polling station No. 3, where he voted that day.

Peggy Daniels testified, inter alia, that Glen Zimmerman was on her eligibility list for polling place No. 3; that Zimmerman voted around lunch time; that she did not "remember him coming" in at "any other time." Daniels recalled:

> [Zimmerman] came in and he said, 'Hello.' He asked us how things were going. Naturally, he was very concerned and he voted, and then he left. He asked me if I wanted a coke and that was all.

Daniels denied that Zimmerman took her aside and spoke with her for a few minutes. In her view, Zimmerman was in the polling room for "no more than five or ten minutes."

5/ Webb was uncertain and her testimony is unclear as to whether there were any voters present when Zimmerman remained in the room following his private conversation with Daniels.

Glen Zimmerman testified, inter alia, that he was Vice President of NAGE during the run-off election; that on August 26 he went to polling place No. 2 around 11:30 a.m. to see "a lady" who "had a grievance"; and that his attempt to see the "lady" had nothing to do with the election. The "lady" assertedly worked on the second floor in the same building that housed polling place No. 2. Zimmerman asked for "the lady" in her office and was told, "She is either on break or she might be voting." Zimmerman then "went downstairs" and looked around; in the process, he "walked into the room where poll #2 was held." Zimmerman saw no voters there at the time. He testified:

> I spoke to Mr. Pugh and the other two observers. I asked * * * if they wanted anything from the snack bar. I asked Mr. Pugh and I believe he said, no he was fine. I said, "do you want me to make a call; do you need any relief or anything." I asked did anybody want me to make a call. I don't believe there was any conversation so far as the election whatsoever.

Zimmerman did not speak to any prospective voters; he approximated his time in voting room No. 2 as, "it couldn't have been over ten minutes * * *." Zimmerman denied spending 30 or more minutes in the room. 6/

After Zimmerman left polling place No. 2, he went, inter alia, back to his work place and then to lunch. After lunch, he voted at polling place No. 3. At polling place No. 3 Zimmerman asked Daniels, "Does anybody want a coke or anything?" He "asked her * * * if she wanted to make a call, if she wanted relief." Zimmerman was "sure [that he] didn't discuss anything as far as the election is concerned." Zimmerman does not recall or remember any voters, other than himself, present at the time. 7/ Zimmerman further acknowledged that he "was in the building" that housed polling place No. 3 on another occasion that day "to see somebody at Assault and Combat, who had a grievance. But there was a hallway [that] actually separated [the area] from the polling place."

6/ Zimmerman also testified that during his visit to polling place No. 2 he engaged in "idle chit chat. [He] didn't believe there was any discussion whatsoever about the election." In the room, he stood some 10 to 15 feet away from the table. Zimmerman did not "recall" talking to Pugh in back of the room. He testified: "this was a year ago;" "If this occurred, I don't remember it." Further, Zimmerman wore no union tag that day or campaign buttons of any kind.

7/ Zimmerman testified that there were "several people that went from where [Zimmerman] worked. They trailed out at the same time."

B. Concluding Findings as to Objection No. 4

I credit the testimony of Lovett summarized above that Zimmerman visited polling place No. 2 on August 26; that Zimmerman was not on the list of eligible voters for that polling place; that Zimmerman engaged in "general conversation" with the official observers present in the room; that Zimmerman "stood back" while prospective voters were present in the room; that Zimmerman spoke privately with Pugh for a few minutes in the back or on the side of the room; and that there were no voters present in the room while Zimmerman spoke privately with Pugh. 8/

I find that Zimmerman spent a total of approximately 30 minutes in the polling place; that none of the officials present asked Zimmerman to leave the room; that Zimmerman did not speak with prospective voters present in the room; that Zimmerman did not wear or display any personal or union identification; and that all observers knowingly and voluntarily signed a certification that balloting at polling place No. 2 was "fairly conducted."

As for Zimmerman's visit to polling place No. 3, I credit the testimony of Webb summarized above, as substantiated and corroborated in part by Daniels and Zimmerman, that Zimmerman entered her polling place twice that day; that during his visits he "had a casual conversation" with the official observers and a private conversation with Daniels in the back of the room; that Zimmerman's private conversation with Daniels took only a few minutes; that there were no voters present during his private conversation; and that after the private conversation Zimmerman "stood around the table for a few minutes longer * * *" and

8/ Lovett's testimony was corroborated and substantiated in material part by Williams, Pugh and Zimmerman. Williams, however, could only recall Zimmerman speaking with Pugh for a few minutes. And, Pugh asserted that no voters were present during Zimmerman's visit; that Zimmerman's visit consumed 5 to 10 minutes; and that he, Pugh, could not recall talking to Zimmerman privately. Zimmerman admittedly visited polling place No. 2; spoke with the observers present; asked them if they needed anything or wanted to be relieved; and did not speak to any prospective voters. Zimmerman approximated his visit to polling place No. 2 as taking no more than 10 minutes.

Insofar as the testimony of Zimmerman, as well as the testimony of Pugh and Williams, conflicts with the testimony of Lovett, I credit the testimony of Lovett as recited above based upon his demeanor and the fact that his testimony, as substantiated and corroborated in part, impressed me as a complete, candid and trustworthy version of what transpired.

and then he left; and that Zimmerman voted at this polling place. 9/ Zimmerman did not talk to prospective voters at polling place No. 3; he wore no union buttons or personal identification; and he apparently was not asked to leave this polling place. Further, the official observers at polling place No. 3 signed a certification as to the propriety of conduct at their station.

III. Objection No. 5: "NAGE observer and alternate working poll simultaneously"

A. Testimony pertaining to Objection No. 5

Caroline Gordon served as an observer for AFGE on August 26 at polling place No. 4. She was on duty at her station during the entire voting period, from about 6:30 to 9:30 a.m. and about 1:30 to 3:30 p.m. She recalled that a Mr. Teagle was the observer for the Activity; that a Mr. Carter was the observer for NAGE; and that a Mr. Griffin was the alternate observer for NAGE. Gordon testified that the NAGE observer and alternate observer were "both" present "most of the day." Gordon explained:

> * * * they were not totally in the room. They were either in the room or outside the room. * * * Mr. Carter, the observer, was in the room all day * * * the alternate [Griffin] would come in and out of the room; either in the hallway or on the ramp, or either out in his car out in the parking lot. He [Griffin] was close by.

Gordon added:

> * * * we would know when he [Griffin] was in the hallway because * * * we were the only ones in the building and you could hear activity out in the hallway. If he [Griffin] was out on the ramp you could hear him walking on the ramp.

9/ Daniels did not remember Zimmerman entering her voting place on more than one occasion that day. Daniels also denied that Zimmerman spoke with her privately. Further, Wishart could not recall Zimmerman entering his polling place that day at all; he testified that no unusual or improper conduct occurred while he was on duty. Zimmerman testified that he asked Daniels at polling place No. 3 if she wanted to be relieved; Zimmerman also acknowledged that he was in the building that housed polling place No. 3 on another occasion that day.

Insofar as Zimmerman's or Daniels' testimony conflicts with the testimony of Webb summarized above, I credit the testimony of Webb on the basis of her demeanor and the fact that her testimony, as substantiated and corroborated in part, impressed me as a complete, candid and trustworthy version of what transpired.

Gordon testified that Griffin stayed in the polling place room "[m]aybe for 10 or 15 minutes at a time" and that voters were present while Griffin was there. Gordon also testified that Griffin "never [had] any real conversations" with the voters; "I think he would just say hello so and so or hi so and so, but never any real conversations." Griffin, however, did talk with Carter. As Gordon recalled:

> He [Griffin] would stand at the end of the table * * * and say, "well, how are things going? Do you want me to relieve you?

Griffin wore no union or personal identification. Gordon also testified:

> * * * there was something lying beside the polling pad. I don't know if it is a scrap of paper, a notebook, or what it was. He [Carter] was keeping a tabulation. I don't know what the tabulation was. I don't know whether it was people that came in or people he knew * * *. I know several times he would say 32 people have been in or 34.

In addition, when the representative of the Department of Labor visited the polling place, Griffin assertedly left the building and went out to the parking lot; after the Department of Labor representative left, Griffin assertedly returned again. 10/ Gordon never mentioned the above conduct of Griffin to the Activity's representative or to the Department of Labor's representative. Gordon signed a Certification on Conduct of Election with Carter and Teagle.

Arthur Carter, observer for NAGE at polling place No. 4, testified, inter alia, that Griffin was his alternate; that Griffin in fact relieved him for a "very short time"; and that Griffin did not stay more than 10 minutes in the polling place. Carter explained:

> * * * Griffin came in one time in the morning and inquired how things [were] going and if I [Carter] wanted him to relieve me, and I told him no. And he [Griffin] came back in the afternoon and he did relieve me.

Carter denied having any knowledge that Griffin came into the polling room every 15 or more minutes or that "Griffin came into the room periodically," as generally claimed by Gordon in her testimony. In addition, Carter explained that he

> didn't have a slip of paper. There were no records for [him] to keep * * *.

10/ Gordon acknowledged that her AFGE alternate "came in one time and voted and she [the alternate] asked [Gordon] did [Gordon] want to be relieved at any time during the day and * * * left. * * *"

Carter denied that Griffin ever asked "how many people had voted." Further, according to Carter, there were no voters in the polling place on the two occasions Griffin entered the room, and Griffin wore no identification, union button or name plate. Carter also recalled that "someone did come in and speak to Mrs. Gordon * * *."

William Teagle, an observer for the activity at polling place No. 4, testified that to the best of his knowledge no one individual came into the polling room "every 15 or 20 minutes" and that "if anyone had come in that frequently [he] would have known it." Teagle acknowledged that his memory of the election "is definitely hazy"; he stated:

> I don't remember [Carter] writing anything down. During the election, we were fairly interested * * * all three of us, as to the number of people who had voted, and periodically we would count from our list the number who had voted and the number who were to come. I don't remember him Carter or anyone else keeping a list.

Teagle added: "* * * The only times we discussed it was among ourselves when there were no voters present." 11/

B. Concluding Findings as to Objection No. 5

Gordon testified, as noted above, that the NAGE observer and alternate were "both" present "most of the day" in and about polling place No. 4. However, I credit the contrary testimony of Arthur Carter, substantiated and corroborated in part by William Teagle, as a more trustworthy account of what transpired. Carter credibly testified that his alternate, Griffin,

> came in one time in the morning and inquired how things [were] going and if [Carter] wanted [Griffin] to relieve [him] and [Carter] told him no. [Griffin] came back in the afternoon and he did relieve [Carter].

Carter credibly denied that Griffin came into the polling place every 15 or more minutes, as generally asserted by Gordon. Carter credibly denied keeping a separate tabulation of votes and that Griffin asked him "how many people had voted." Further, Carter credibly testified

11/ Counsel for NAGE announced that Griffin was "out sick" on the day of the hearing and "will not appear as a witness for" NAGE. Attached to NAGE's post-hearing brief is what purports to be a statement by Griffin. I do not rely upon this statement.

that no voters were present in the polling place during Griffin's two visits. Likewise, Teagle, the other observer, credibly testified that no one visited his polling place every 15 or more minutes or that Carter kept a private voting tabulation. No one apparently asked Griffin to leave the polling area or complained about his alleged misconduct. All three observers signed a certification as to the conduct at their polling place.

IV. The pertinent provisions of the Assistant Secretary's Procedural Guide for Conduct of Elections

The Assistant Secretary has issued a "Procedural Guide for Conduct of Elections Under Supervision of the Assistant Secretary Pursuant to Executive Order 11491." The Introduction of the Procedural Guide states, inter alia:

1. INTRODUCTION

Section 10(d) of Executive Order 11491 provides that all elections shall be conducted under the supervision of the Assistant Secretary of Labor for Labor-Management Relations and shall be by secret ballot. In implementing this responsibility the Assistant Secretary has issued regulations covering election procedures. In order to insure a measure of uniformity, observance of generally accepted principles of election conduct, and to encourage compliance with the requirements of the Executive Order and the Assistant Secretary's regulations, this procedural guide has been prepared for use by the agencies and labor organizations.

* * *

Sections 5 and 6 of the Guide provide:

5. CONDUCTING THE ELECTION

Voting places should be well lighted, and should contain a table and chairs for the observers, a chair or stand on which to place the ballot box, and voting booths. Booths should be like those used in political elections. The front curtain of the booth, however, should not be so long that it is impossible to ascertain if a voter is in the booth without opening the curtain. In many areas voting booths can be borrowed from civic election authorities. A separate office, locker room, or other enclosed space can serve as a voting booth if it provides absolute privacy.

The observers should sit at a checking table with an initialed eligibility list. When a voter appears, he should give his name, and the observers should check the name on the eligibility list with a definite, agreed mark. Each observer should make his mark by each name with a pencil of distinct and different color. After the name is marked, the voter should be given a ballot. He should then enter the booth, mark and fold his ballot, and drop it into the ballot box, which should be outside the booth in plain view of observers. If a voter's eligibility is challenged, he should be given a ballot, a small "Secret Ballot" envelope and a larger challenge envelope. He should then enter the booth, mark and fold his ballot and place his marked ballot in the envelopes, which should be sealed before deposit in the ballot box. Only the voter should handle the ballot he has received. After depositing the ballot in the box, the voter should leave the polling area.

In large elections, a second set of observers may sit near the ballot box, but they should NOT handle the ballots. These observers are to watch the voting booths to see that only one voter at a time enters a booth and to see that each voter deposits his ballot before leaving the polling place. Relief observers may be designated when long voting periods are involved.

If a ballot is spoiled, the voter should return it to the observer from whom he received it and place it in an envelope marked "spoiled ballot" which he must seal before receiving a new ballot. Spoiled ballot envelopes should never be opened. All ballots should be retained until the case is closed, and they should then be destroyed.

Neither supervisors, managerial employees, nor labor organization officials should be in or near the polling place while the election is being conducted. Only official observers and voters may be in voting places during an election.

After the polls are closed the observers should sign a certificate of conduct * * *. Objections to signing may be expressed in separate signed statements, containing reasons. The slot in the ballot box should be sealed over, and the seals should be signed by the observers. Observers should then take the sealed ballot box, unused ballots, and all other election material to the place where counting will occur. Where there are several voting sessions, ballot boxes should be sealed and signed at the end of each session, a certificate of conduct should be signed, and the election material should either remain in the custody of the observers or should be placed in a secure place. During prolonged intervals between voting sessions the unused ballots should also be sealed with the seal signed by the observers. [Emphasis in text; footnote omitted.]

* * *

6. ELECTIONEERING

No electioneering can be allowed in or near polling places. Election campaign literature should be removed from polling places and nearby areas. The parties are encouraged to agree on a neutral zone around a poll to minimize the possibility of objections. In many cases labor organizations agree that there will be no distribution of any election campaign literature on election day.

* * *

CONCLUSIONS

The principle issue raised is whether Intervenor AFGE has carried its burden of showing that the unit employees were deprived of a fair and free choice in the selection of a bargaining representative. Section 202.20(d) of the Assistant Secretary's Rules and Regulations provides, inter alia: "The objecting party shall bear the burden of proof regarding all matters alleged in its objections to conduct affecting the results of the election." For the reasons stated herein, I find that AFGE has not sustained its burden with respect to Objections No. 4 and No. 5.

I. The applicable principles in the private sector

In Charleston Naval Shipyard, A/SLMR No. 1 (1970), the Assistant Secretary made clear that, although "decisions issued under the Labor-Management Relations Act, as amended, are not controlling under Executive Order 11491," the Assistant Secretary "will, however, take into account the experience gained in the private sector under the Labor-Management Relations Act, as amended, policies and practices of other jurisdictions, and those rules developed in the Federal sector under the Executive Order * * *." And compare, Norfolk Naval Shipyard, A/SLMR No. 31 (1971), where the Assistant Secretary stated, inter alia:

* * *

> It is well-extablished in the private sector that any promise or offer of benefit, except waiver of dues and initiation fee, which is made contingent upon the outcome of the election, necessarily constitutes interference with the freedom of choice by the employees. Similarly, it is established that a gift of immediate life insurance in an election campaign constitutes a tangible economic benefit which impairs the employees' freedom of choice.
>
> I conclude, in agreement with the Hearing Examiner, that no less rigorous standards should obtain in representation elections among Federal employees than those which prevail in the private sector. [Emphasis added]

* * *

In the private sector, the Labor Board has frequently considered contentions similar to those raised in this proceeding. Thus, in Milchem, Inc., 170 NLRB 362, 363 (1968), the Labor Board re-stated its rules with respect to electioneering at the polls. Noting that

> the potential for distraction, last minute electioneering or pressure, and unfair advantage from prolonged conversations between representatives of any party to the election and voters waiting to cast ballots is of sufficient concern to warrant a strict rule against such conduct, without inquiry into the nature of the conversations * * *

the Labor Board held that

> conversations between a party and voters while the latter are in a polling area awaiting to vote will normally, upon the filing of proper objections, be deemed prejudicial without investigation into the content of the remarks.

The Labor Board stated, however, that

> this does not mean that any chance, isolated, innocuous comment or inquiry by an employer or union official to a voter will necessarily void the election. We will be guided by the maxim that "the law does not concern itself with trifles."

Accordingly, in the Milchem case the Labor Board set aside an election because a union official had conversed for several minutes with voters waiting in line to vote. And in Star Expansion Industries Corporation, 170 NLRB 364, 365 (1968), the Labor Board also set aside an election where a union representative, despite two warnings from the Board's agent, engaged in electioneering about 10 to 15 feet from the entrance to the polling place for a substantial part of the voting period. The Board noted that its agent had specified a "no-electioneering" area, and that the union representative had wilfully disregarded his instructions.

However, in the later case of Harold W. Moore & Son, 173 NLRB 1258 (1968), the Labor Board emphasized that the Milchem rule applies only to conversations with voters "in the polling area or in line waiting to vote," and refused to set aside an election where the union agent conversed with voters in a parking lot outside a warehouse in which the election was held, the Board finding that "the alleged electioneering was [not] so near the polls as to be deemed objectionable."

And in Marvil International Security Service, 173 NLRB 1260 (1968), the Labor Board sustained its regional director's finding that the entrance to a building in which an election was being held was beyond the "no-electioneering area" established by Board's agent, stating that

> the establishment of an area in which electioneering is not permitted, must in the first instance be left to the informed judgment of the Regional Director and his agents conducting the election. They are on the scene and familiar with the physical circumstances surrounding the location of the polls. 12/

Further, in Polymers, Inc., 170 NLRB 333 (1968), enforced, 414 F. 2d 999 (C.A. 2, 1969), cert. den., 396 U.S. 1010, the employer disputed the validity of a Labor Board certification on the grounds that the Labor Board's agent failed to adhere strictly to the standards set forth in certain Board manuals. The Labor Board stated, inter alia:

* * *

> [One] of the manuals requested by respondent, * * * entitled "A Guide to the Conduct of Elections," is a training guide which was issued by the Office of the General Counsel of the Board to the Regional Office employees in 1960. The booklet sets out some suggested procedures for the safe,efficient and expeditious handling of representation elections. The procedures described in the document were not intended to be all inclusive or of mandatory effect. Rather, they were designed to suggest to field agents those practices which give the greatest promise of assuring fair and secret elections. These suggested procedures simply indicate optimum standards for the conduct of elections. The Board is mindful of the fact that because of the great variety of conditions in which elections may be conducted, the suggested procedures can not always in practice be met to the letter. * * * Deviation from procedures suggested in the booklet, therefore, is not deemed in and of itself a determinative factor in our appraisal of whether an

12/ Moreover, as the Labor Board has stated, "the mere appearance of a supervisor at the polls to vote without incident is no basis for setting aside an election ...." Brown-Dunkin Company, 118 NLRB 1603, 1604 (1957). Accord: Dixie Broadcasting Co., 120 NLRB 869, 870-871 (1958).

election has been improperly conducted. Instead, our decisions in this area rest upon an analysis of whether, on facts presented in each case, the election has been carried out in a manner which assured the secrecy and security of the balloting. * * *

In enforcing the Labor Board's decision and order, the Second Circuit held in Polymers, Inc. v. N.L.R.B., 414 F. 2d 999 (C.A. 2, 1969), as follows:

* * *

The regional director conducted an investigation into the alleged irregularities. The Board affirmed his findings. Although the Board recognized that the conduct of the election did not comport with optimal safeguards of accuracy and security, and it acknowledged that the sealing of the ballot box could have been improved upon, it concluded that "desirable election standards were met and that no reasonable possibility of irregularity inhered in the conduct of the election."

* * *

Thus, the Board declined to apply a standard which would disregard the remoteness of the possibility of irregularity.

* * *

* * * [E]ach possibility must be assessed upon its own unique facts and circumstances, under expert analysis by the Board, to determine whether to certify or set aside. A per se rule of possibility would impose an overwhelming burden in a representation case. If speculation on conceivable irregularities were unfettered, few election results would be certified, since ideal standards cannot always be attained. [And see cases cited.]

In sum, as the above authorities show, the Labor Board has recognized that in view of the volume of elections conducted by its regional offices and the varied conditions prevailing in the field, it would be unrealistic generally to require that all of the rules, regulations and guidelines relating to election procedures be met to the letter in every case. Such a standard, in the Labor Board's view, would mire the representation procedures of the National Labor

Relations Act in endless administrative investigations, litigation, and re-run elections, without making those procedures any more reliable. See, e.g., The Liberal Market, Inc., 108 NLRB 1481, 1482 (1954); Hollywood Ceramics Co., 140 NLRB 221, 224 (1962).

II. Intervenor AFGE has failed to sustain its burden of proof

"[Taking] into account the experience gained in the private sector under the Labor-Management Relations Act" with respect to claimed objections to election misconduct (Charleston Naval Shipyard, supra), I find that Intervenor AFGE has failed to sustained its burden of proof. Thus, AFGE claims in Objection No. 4 that "NAGE officials [were] campaigning at two polling places". Instead, the credited evidence summarized above shows that NAGE official Zimmerman visited polling place No. 2; that Zimmerman spoke briefly with observer Pugh at the polling place; that Zimmerman also engaged in general conversation with the other officials present at the polling place; that no one asked Zimmerman to leave the polling area; that Zimmerman did not engage in any conversations with prespective voters at the polling place; and that Zimmerman did not engage in any election campaigning during his visit and did not wear any name tags or union buttons. The credited evidence also shows that Zimmerman's visit to polling place No. 3, where he in fact voted, was also void of any conversation with prospective voters or campaigning. Zimmerman was apparently never asked to leave this voting station and, as shown, all observers certified the conduct at their respective stations.

In sum, there has been no showing of any misconduct on the part of Zimmerman unless, of course, we regard Zimmerman's mere presence at the polls, without more, as objectionable per se. However, the Labor Board's Milchem rule -- cited by AFGE and NAGE in their post-hearing briefs -- appears reasonably designed to protect the electorate in this respect and, further, the record before me fails to show any reason or need for the adoption of a stricter or more severe standard for employees in the Federal sector. Accordingly, under Milchem, Zimmerman's conduct affords no basis for setting aside the election. Further, that Zimmerman's presence at the polling places assertedly violated the Assistant Secretary's Procedural Guide is also, without more, not a basis for setting aside the run-off election. See Polymers, supra. In my view, the Guide is just a guide and no more. As the Second Circuit stated in Polymers:

A per se rule of possibility would impose an overwhelming burden in a representation case. If speculation on conceivable irregularities were unfettered, few election results would be certified * * *.

In addition, AFGE claims in Objection No. 5 that a "NAGE observer and alternate [were] working [a] poll simultaneously". As stated, the credited evidence does not show any election misconduct at the polling station involved. 13/ And, the mere closeness of the vote does not entitle an objector to a re-run election. 14/

Accordingly, I conclude that AFGE has failed to sustain its burden of proof with respect to Objections 4 and 5.

RECOMMENDATION

Upon the basis of the foregoing findings and conclusions, I recommend that the Assistant Secretary sustain the dismissal of Objections 4 and 5 filed herein. 15/

Frank H. Itkin
Hearing Examiner

DATED:December 13, 1971
Washington, D. C.

13/ Even if I were to assume that the alternate observer at polling place No. 4 (Griffin) engaged in the conduct related by Gordon, I would find this insufficient basis for setting aside the election under the Milchem rationale. The alternate did not campaign in the area; he did not engage in any sustained conversation with prospective voters; and he apparently was not asked to leave the area. Further, all observers certified the balloting at this station.

14/ AFGE also argues that "NAGE, by signing the [consent election] agreement, agreed to be bound by all the applicable rules, regulations, policies and procedures". Nevertheless, a non-prejudicial or immaterial deviation from the Procedural Guide would not entitle a party to a consent agreement to a re-run election. Cf. Breman Steel Co., 115 NLRB 247, 249 (1956), cited by AFGE; East Texas Pulp & Paper Co., 114 NLRB 885, 888 (1955).

15/ At the close of AFGE's case, counsel for NAGE moved for a dismissal of the objections. I reserved ruling on the motion. For the reasons stated herein, I would grant the motion.

May 11, 1972

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

DEPARTMENT OF THE NAVY,
NAVAL AIR REWORK FACILITY, NAS,
ALAMEDA, CALIFORNIA
A/SLMR No. 158

The subject case arose from a petition filed by the International Association of Machinists and Aerospace Workers, AFL-CIO, Naval Aircraft Lodge Local No. 739, for a unit of all the employees holding pneumatic ratings in the Activity's Power Plant Division.

The Assistant Secretary found that the unit sought was not appropriate. In this connection, he found that the employees in the claimed unit are engaged in an integrated production process requiring the cooperation and coordinated efforts of various job classifications working in a number of functionally interdependent shops; that the requested unit would not include employees who work in the same shops as the claimed employees and who perform duties similar to those performed by the employees in the proposed unit; that the claimed unit would not include employees located in other divisions who perform duties similar to those performed by the employees in the proposed unit; and that the employees in the proposed unit share the same general terms and conditions of employment with other employees within the Activity.

In these circumstances, the Assistant Secretary concluded that the employees in the unit sought by the petition did not possess a clear and identifiable community of interest distinct from other employees of the Activity. Moreover, in his view, such a unit would constitute an artificial fragmentation of an integrated function and would not promote effective dealings and efficiency of agency operations. Accordingly, he ordered that the petition be dismissed.

A/SLMR No. 158

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

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

Activity

and

Case No. 70-2302

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO, NAVAL
AIRCRAFT LODGE LOCAL NO. 739

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Henry C. Lee. 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 Petitioner's brief, 1/ the Assistant Secretary finds:

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

2. Petitioner, International Association of Machinists and Aerospace Workers, AFL-CIO, Naval Aircraft Lodge No. 739, herein called the IAM, seeks an election in a unit of all ungraded employees at the Activity holding ratings of pneumatic systems mechanic, pneumatic systems assembler, pneumatic systems worker, helper-pneumatic systems, fuel systems mechanic, fuel systems assembler, fuel systems worker and helper-fuel systems; excluding all management officials, supervisors, any employees engaged in Federal personnel work in other than a purely clerical capacity, employees covered by exclusive representation and guards. 2/

The Activity contends that the unit sought by the IAM is inappropriate. It argues, among other things, that the petitioned for unit constitutes neither a craft unit nor a functional departmental unit. Moreover, it asserts that even assuming it was found to be a craft or functional unit, the claimed employees, nevertheless, would lack the separate and distinct community of interest required for the establishment of an appropriate unit for the purpose of exclusive recognition under the Executive Order. The Activity further argues that the establishment of such a unit would constitute an artificial and unwarranted fragmentation of a highly integrated production facility which would not promote effective dealings or efficiency of agency operations and that the only appropriate unit that could be established would be one that included "all the facility employees."

There is no history of bargaining with respect to the petitioned for employees. However, the record reveals that, in the past, eight(8) labor organizations 3/ have been accorded exclusive recognition in nine (9) separate units at the Activity.

The Naval Air Rework Facility at Alameda, California, is an industrial activity of the Naval Shore Establishment. Under the command of the Naval Air Systems Command, it is one of two major maintenance, repair and modification plants for Naval aircraft on the West Coast and is engaged in providing depot level maintenance functions on aircraft for the U. S. Navy. Organizationally, the Activity is comprised of 3 directorates which are subdivided into 8 departments, 30 divisions and 76 branches, which are further subdivided into sections, shops and work centers. It employees approximately 6,300 civilian personnel.

The Activity is headed by a Commanding Officer assisted by an Executive Officer. Reporting to the above officials is the Production

1/ The Activity filed an untimely brief which has not been considered.

2/ The unit appears as amended at the hearing. The record reveals that at least one of the classifications in the proposed unit, as amended, does not, in fact, exist at the Activity.

3/ The Association of Aeronautical Examiners; International Association of Machinists; International Brotherhood of Electrical Workers; National Association of Government Inspectors; National Association of Planners, Estimators and Progressmen; Pattern Makers Association of San Francisco and Vicinity; Operations Analysis Association; and Methods and Standards Association.

Officer who is responsible for the operation of three departments, all 4/ of which are involved directly or indirectly with the Activity's production process. The Production Department, which is the largest department at the facility, is subdivided into 4 divisions, namely; the Metal and Process Division, engaged in the manufacture of metal type components utilized throughout the Activity in the completion of the Activity's mission; the Avionics Division, engaged in rework of electrical components; the Air Frame Division, engaged in the processing of the basic aircraft product by disassembly, reassembly and preparation for flight testing; and the Power Plant Division, engaged in rework and testing of engine accessories.

The Power Plant Division is staffed by approximately 870 employees working in 36 different trade rates and classifications, who are assigned to one of the 3 branches 5/ which comprise the Division. The proposed unit includes approximately 139 employees holding pneumatic systems ratings who are located primarily in the Pneumatic and Engine Accessory Branch of the Power Plant Division. 6/ These employees, for the most part, work in various shops within the Pneumatic and Engine Accessory Branch, which shops include also employees working in various rates and classifications who are not included in the proposed unit. The record reveals that none of the shops in the Pneumatic and Engine Accessory Branch are comprised exclusively of employees with pneumatic systems ratings and that employees in each of the shops are supervised by a foreman who may be a pneumatic systems mechanic or an engine mechanic.

The evidence establishes that the employees of the Pneumatic and Engine Accessory Branch, for the most part, perform duties which are repetitive and involve a particular aircraft component. Moreover, the employees in the claimed unit perform duties which are similar to those of other employees in the Pneumatic and Engine Accessory Branch who are not included in the unit sought. Work assignments within the shops are based upon which employee is most capable of performing the work involved

4/ The Production, Planning and Control Department, the Production Engineering Department and the Production Department.

5/ The Process Branch, Assembly Branch, and Pneumatic and Engine Accessory Branch.

6/ Three of the employees are located in the Assembly Branch.

and the employees in the proposed unit work side-by-side on the same components and frequently at the same bench with employees who are not included in the claimed unit. 7/ The record further reveals that the functions performed by the employees of the Pneumatic and Engine Accessory Branch are part of an integrated process whereby they must interact with other employees in the Power Plant Division and throughout the Production Department for the completion of the Activity's mission. Also, there are similarities in the qualification requirements for all the employees of the Power Plant Division. Thus, the Division's employees, including those who are not covered by the petition herein, have mechanical backgrounds and many have transferred to the Division from other classifications or rates in other shops, divisions and departments throughout the Activity.

The record discloses that due to workload fluctuations there has been a substantial number of transfers of employees for extended periods within the various divisions and branches, including the branch in which most of the claimed employees are located at the facility. Further, the record reveals that the employees in the proposed unit share the same general terms and conditions of employment with other employees within the Production Department and that in the event of a reduction-in-force or an adjustment in the personnel ceiling, employees in the proposed unit hold "retreat or bumping rights" to previously held classifications or positions.

Based on the foregoing, I find that the employees in the claimed unit do not have a clear and identifiable community of interest which is distinct from other employees of the Activity. Thus, the facts discussed above establish that the petitioned for employees are engaged in an integrated production process requiring the cooperation and coordinated efforts of various job classifications working in a number of functionally interdependent shops. In addition, the proposed unit would not include employees who work in the same shops as the claimed employees and perform many of the same duties as the employees in the proposed unit. And, as noted above, the claimed unit would not include employees located in other divisions and branches who perform duties similar to those performed by the employees in the proposed unit.

7/ The record reveals that in excess of 50 air frame mechanics located in the Air Frame Division and certain other employees located in various divisions and branches at the Activity, perform duties similar to those performed by the employees in the Power Plant Division sought by the IAM.

In these circumstances,and noting the fact that the employees in the proposed unit share the same general terms and conditions of employment with other employees within the Activity, I find that the petitioned for unit is not appropriate for the purpose of exclusive recognition. In my view, such a unit would constitute an artificial fragmentation of an integrated function and clearly would not promote effective dealings and efficiency of agency operations. 8/

Accordingly, I shall dismiss the petition in the subject case.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 70-2302 be, and it hereby is, dismissed.

Dated, Washington, D. C.
May 11, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

8/ See Department of the Navy, Naval Air Rework Facility, Alameda, California, A/SLMR No. 49.

May 17, 1972

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

GENERAL SERVICE EMPLOYEES UNION,
LOCAL NO. 73, AFFILIATED WITH
SERVICE EMPLOYEES INTERNATIONAL
UNION, AFL-CIO
A/SLMR No. 159

This case arose as the result of a complaint filed by Edward S. Rylko alleging that General Service Employees Union, Local No. 73, had violated Sections 204.2(a)(1), (2), and (5) of the Rules and Regulations implementing Executive Order 11491 by depriving union members in the Engineering Division at the Veterans Administration Edward Hines, Jr. Hospital of proper and equal representation by disregarding him as their committeeman and spokesman and by improperly dismissing him as committeeman.

The Hearing Examiner concluded that the evidence failed to establish that the Respondent Union interfered with employees' equal rights, freedom of speech and assembly, and safeguards against improper disciplinary action.

The Assistant Secretary dismissed the complaint on the ground that the case was moot because the Complainant voluntarily resigned from the Respondent Union after the hearing began and indicated at the hearing that he did not wish to be reinstated to such Union. He noted the rights protected by Sections 204.2(a)(1), (2) and (5) of the Regulations apply only to union members and any remedy would have to relate to the member who filed the complaint.

Accordingly, because the Complainant's resignation from the Respondent labor organization precluded the granting of any relief in this case, the Assistant Secretary dismissed the complaint.

A/SLMR No. 159

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICE EMPLOYEES UNION,
LOCAL NO. 73, AFFILIATED WITH
SERVICE EMPLOYEES INTERNATIONAL
UNION, AFL-CIO

Respondent

and

Case No. 50-5154

EDWARD S. RYLKO

Complainant

DECISION AND ORDER

On February 15, 1972, Hearing Examiner Frank H. Itkin issued his Report and Recommendations in the above-entitled proceeding finding that Complainant had failed to prove the violations alleged in his complaint and recommending that the complaint be dismissed.

Upon consideration of the Hearing Examiner's Report and Recommendations and the entire record in the subject case, I adopt the recommendation of the Hearing Examiner but on different grounds as indicated below.

Complainant alleged in a complaint filed on February 24, 1971, that Respondent Union violated Sections 204.2(a)(1), (2), and (5) of the Rules and Regulations implementing Executive Order 11491 because it deprived union members in the Engineering Division at the Veterans Administration Edward Hines, Jr. Hospital of proper and equal representation by disregarding him as their committeeman and spokesman and by improperly dismissing him as committeeman. A notice of hearing was issued on July 9, 1971, and the hearing was conducted on August 19 and September 8 and 9, 1971. After the hearing began the Complainant voluntarily resigned from the Respondent labor organization. He stated at the hearing on September 9, 1971, that he did not wish to be reinstated to the Respondent labor organization nor have anything to do with such organization.

The rights protected by Sections 204.2(a)(1), (2) and (5) of the Regulations apply only to union members and any remedy would have to relate to the member who filed the complaint. The Complainant's resignation from the Respondent labor organization precludes the granting of any relief in this case and, therefore, the complaint should be dismissed.

ORDER

IT IS HEREBY ORDERED that Case No. 50-5154 be, and it hereby is, dismissed.

Dated, Washington, D. C.
May 17, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

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

GENERAL SERVICE EMPLOYEES UNION,
LOCAL NO. 73, AFFILIATED WITH SERVICE
EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

Respondent

and Case No. 50-5154

EDWARD S. RYLKO,

Complainant

Lewis Cade, Union Representative,
appearing on behalf of Respondent,
General Service Employees Union,
Local No. 73, Affiliated With
Service Employees International
Union, AFL-CIO.
67 West Division Street
Chicago, Illinois 60610.
Edward S. Rylko, Complainant,
appearing pro se,
2 Ambassador Avenue
Lockport, Illinois 60441.

Before, FRANK H. ITKIN, Hearing Examiner.

REPORT AND RECOMMENDATIONS

Statement of the Case

This proceeding arises under Executive Order 11491. It was initiated by a complaint filed on February 24, 1971, by Edward S. Rylko, alleging that respondent General Service Employees Union, Local No. 73, Affiliated With Service Employees International Union, AFL-CIO (herein, "the Union") violated Sections 204.2(a)(1), (2) and (5) of the Rules and Regulations promulgated pursuant to the Executive Order, pertaining to standards of conduct for labor organizations (29 C.F.R., Ch. II, Part 204.2(a)(1), (2) and (5)). The Chicago Regional Administrator of Labor-Management Services Administration, United States Department of Labor, issued a notice of hearing on the complaint on July 9, 1971, as later amended. The hearing was conducted before me on August 19, September 8 and 9, 1971, at Chicago, Illinois. All parties appeared without counsel (respondent Union appearing by its Staff Representative, Lewis Cade) and were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, and submit oral argument and file briefs.

Upon the entire record in this matter and from my observation of the witnesses, I make the following findings of fact and conclusions:

Findings of Fact

I. Introduction; the contentions of the parties

Respondent Union is the collective-bargaining representative for, inter alia, a unit composed of all non-supervisory Wage Board and Veterans Canteen Service Employees at the Veterans Administration Edward Hines, Jr. Hospital, located in Hines, Illinois. The bargaining unit includes employees working in the Hospital's Engineering Division. Complainant Edward S. Rylko, at all times material, worked in the Engineering Division.

In his complaint, Rylko alleges that the Union violated Sections 204.2(a)(1), (2) and (5) of the Rules and Regulations promulgated pursuant to the Executive Order, by:

> Depriving equal rights to the people in the Engineering Division [of the Employing Agency] by ostracizing, disrespecting and disregarding [Rylko] as their committeeman and spokesman in matters of concern to them [, and] because of [the Union's] attitude depriving people in the Engineering Division of proper and equal representation.

Rylko also alleges in his complaint:

> The next day after [the] Union received my [Rylko's] letter complaining of the Union Representative's attitudes toward me as a committeeman, [Union Representatives] Mr. Smith and Mr. Cade said they are dismissing me from [the committee.] How can they do this over the wishes of the people?

Annexed to the complaint is Rylko's letter (referred to above), dated January 28, 1971, addressed to the Union's President, John Coleman. The letter states:

* * *

Dear Sir:

I was elected as committeeman for the Engineering Division here at Hines Hospital by my constituents, to represent their interests in contract negotiations and union-management matters here at this station.

Because I am being ostracized, disregarded and also disrespected by your staff representatives Mr. Cade, Mr. Smith and Mr. Kurshenbaum, I am unable to accomplish being an effective spokesman for my constituents. In 1968, a similar complaint /was made/ at union hall 1/

It /the earlier complaint/ has not been corrected. In fact the situation has reached a new low since Mr. Cade has become a staff representative. All he knows is how to make excuses for management in contract violations and other matters. I'm beginning to wonder who's payroll is he on, the union or management?

I am seeking informal adjustments to my complaints. I have tried to reach some sort of agreement with Mr. Smith and Mr. Cade without any success.

All I know is my allegiance is to the constituents whom I represent, and Mr. Smith and Mr. Cade stand in my way of performing this function.

If the situation is not rectified within the next few weeks, I've been seriously thinking of lodging complaint with the Area Administrator, Department of Labor.

* * *

On June 7, 1971, Union President John Coleman wrote the Labor-Management Services Administration, as follows:

* * *

1/ Portions of this letter, annexed to Exhibit A/S-2, are illegible.

In response to the complaint lodged by Mr. Edward Rylko against Local 73, SEIU:

1. Mr. Rylko was not elected by the membership. He was appointed by a joint council from VA Hines Hospital comprised of General Schedule and Wage Grade employees. This council, after trying to work with Mr. Rylko and finding it impossible, decided to drop him from the council because of his refusal to comply with policies set forth by this council. Mr. Lewis Cade and Mr. George Smith have no vote power on this council. Their responsibility is to try to carry out the policies as set forth by the aforementioned council.

2. Enclosed you will find copies of a complaint lodged by Mr. Rylko and our answer to him. We do not feel we are in a position to change any decision made by the VA Hines-Local 73 council.

* * *

In addition, Union Representative Cade argued before me that Rylko was not "denied equal rights and freedom of speech and assembly .... Mr. Rylko was extended every courtesy extended [to] any other member or committeeman, and probably more in some cases." Further, Cade argued that Rylko, by his conduct, "interfere[d] with [the] rights [of the other union and committee members], he did not support any views of the committee, ... [or the Union] Local 73; [and] he deprived other members and committeemen of their constitutional rights to speak at ... meetings." Cade also asserted that Rylko's status as committeeman is not protected by Section 204.2(a)(5) of the Rules and Regulations because he was not "fired, suspended, expelled or otherwise disciplined" as a "member" of the Union. Finally, Cade argued that since Rylko subsequently resigned as a member of the Union, he is not entitled to any relief under the cited Rules and Regulations. 2/

2/ After the hearing commenced in this case, Rylko voluntarily resigned from the Union. Rylko made the following statement before me:

* * *

Examiner Itkin: Do you think that you can be reinstated to the committee and not be a member of the Union?

Mr. Rylko: I do not at this time. And since everything that has transpired in the past, I do not wish to be reinstated to the Union. I do not wish to be a part of the Union. I do not wish to be a part of this Union because I do not believe it is practicing democratic principles accorded us by the Executive Order. And since this is the case, I do not wish to have anything to do with the Union.

* * *

Sections 204.2(a)(1), (2) and (5) of the pertinent Rules and Regulations provide:

§204.2 Bill of Rights of members of Labor organizations.

(a) (1) Equal rights. Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) Freedom of speech and assembly. Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

* * *

(5) Safeguards against improper disciplinary action. No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (i) served with written specific charges; (ii) given a reasonable time to prepare his defense; (iii) afforded a full and fair hearing.

The question presented is whether Rylko has sufficiently established that the Union, by its conduct, violated the foregoing provisions. The pertinent evidence adduced by the parties is summarized below:

II. Complainant's case: the testimony of Edward S. Rylko and Richard Hodge

The two witnesses appearing before me on behalf of complainant were Rylko and Hodge. Rylko testified, inter alia, that he had helped organize the Union in 1964; that he quit the Union in 1968 because, in his view, "they weren't doing any justice for the Engineering Division and we got nothing but a bunch of hogwash from the Union Representatives"; that he rejoined the Union in early 1970; that he was thereafter "appointed by the people in the Engineering Division" as their committeeman "pending an election that was supposed to transpire"; and that during late March 1970 Rylko became the committeeman for the Engineering Division without an election "because there was no opposition" to him.

Rylko further testified that, as a committeeman, he sent various memoranda to the Hospital's Chief Engineer, James Goff, urging the reestablishment of union-management meetings in the Engineering Division to discuss, inter alia, "laxity and disregard /of/ the Union contract, posting seniority schedules for overtime" and related subjects. Rylko also went to see the Hospital's Personnel Director, George Kvasnicka, and said:

> I'm coming here to speak out for the people /in the Engineering Division/ that I am supposed to represent.

According to Rylko, Personnel Director Kvasnicka urged Rylko to bring one of the Union's staff representatives--George Smith or Lewis Cade--with him if he wanted to discuss such union matters. Rylko was repeatedly told by the Hospital's personnel representatives to "work through /his staff/ Union representative" when he tried to deal directly with management. Rylko admittedly was upset by this treatment because he felt that he "was just a figurehead when /he/ went over /to the personnel office/ to complain . . .; it was just like passing the time of day with management because the Union was not backing /him/."

On one or more occasions, Rylko assertedly went to Union Representative Cade to assert an alleged contract violation by the Employing Agency. Cade apprised Rylko that he did not have a case. Rylko testified: "Mr. Cade or other Union representatives had a negative attitude toward me when I talked to management about certain things that was supposed to be handled within the Union." Rylko claimed that other committeemen approached management directly without the Union's staff representatives. The record, however, does not sufficiently support this general assertion.

During early 1971, Rylko prepared and circulated among the personnel in the Engineering Division for signing, the following petition:

* * *

January , 1971

TO WHOM IT MAY CONCERN

We the undersigned are formally objecting to the disregard, disrespect and ostrasizing of our elected Committeemen in;

(a) Matters pertaining to our Union Contract

(b) In Union Management matters of concern to us in the Engineering Division at Hines Hospital.

* * *

Also during early 1971, Rylko sent a letter to Union President Coleman criticizing the Union and its staff representatives. (This letter, which is annexed to the complaint, is quoted at length, supra.)

During January 1971, according to the testimony of Rylko, the Union called a meeting of its committeemen for the Hospital's Wage Board personnel as well as the committeemen for another bargaining unit composed of the Hospital's General Schedule employees. At this meeting, Union Representative Smith accused Rylko of circulating petitions against the Union. During a heated exchange between Union Representatives Smith, Cade and Rylko, Rylko assertedly was removed as a committeeman.

Rylko, in later testimony before me, attempted to correct his earlier testimony concerning his dismissal as committeeman. Rylko apparently was not dismissed as a committeeman until after he participated in one or more committee meetings concerning proposals for a new collective-bargaining agreement during January and February 1971. Thus, Rylko testified that he attended one such meeting in late January 1971; that Union staff Representatives Smith and Cade presented a proposed collective-bargaining agreement at the meeting; and that Rylko made a number of counterproposals. There was, according to Rylko, a heated discussion between Smith, Cade and Rylko at the meeting. And, at one point, Cade and Smith walked out of the meeting; however, they later returned. During this meeting, the committeemen ultimately voted on a number of contract proposals in issue, including the counterproposals suggested by Rylko. Rylko further testified that during another committee meeting in early February 1971, he attempted to read his

petition and letter to Union President Coleman, as discussed supra. It was at this meeting, according to Rylko, that Cade told Rylko that they did not want to hear his petition and Smith and Cade dismissed Rylko from the committee.

Rylko also testified that the Union held committee meetings composed of committeemen for both the Wage Board and General Schedule unit employees. Rylko persistently opposed what he regarded as an improper attempt to merge separate bargaining units. Rylko secured a vote from his fellow Wage Board committeemen not to merge or meet with the General Schedule committeemen. The record reflects that Rylko apparently prevailed in his attempt to block any merger or consolidation of the two units. In fact, separate contracts for the two units were later negotiated and ratified by the membership.

The Hospital, for a period of time, had granted excused leaves of absence to committeemen attending contract meetings. Rylko, however, persisted in getting an excused leave of absence for an additional representative from the Engineering Department. Thereafter, the Hospital--according to Rylko--reconsidered its leave policy. And, at one such committee contract meeting, Cade announced that Rylko had "ruined it"; they would not get "excused leave" to discuss the proposed contract.

Later, during July 1971 a notice was posted at the Hospital stating that there would be a membership meeting to ratify the new contract for Wage Board employees. The notice was dated June 28, and the ratification meeting was scheduled for July 1, 1971. Rylko claims this notice did not afford the membership ample opportunity to participate in ratification. Rylko in fact showed up at the meeting. He was the only employee present from the Engineering Division. There were some 25 other employees present in a unit of about 500 persons. At this meeting, Rylko insisted that the entire contract be read. A number of the employees present waited during part of the reading and then started to leave. As Rylko explained: "They wanted to go home so they were leaving." Union Representative Cade asked the employees not to leave and, finally, how they would vote on the contract. Rylko claims that the Union's Staff Representatives, by their conduct, did not permit him to speak out sufficiently at this meeting on behalf of the Engineering Division. 3/

Another subject of complaint related before me by Rylko was that, during early 1970 when Union Representatives (including Rylko) went to Washington, D. C., to attend a wage survey conference, the

3/ Rylko also claims that membership cards of employees present were not properly inspected.

Union's Staff Representatives urged Rylko not to incumber a particular governmental official involved with his various complaints about wage structures and related matters.

On cross-examination, Rylko generally acknowledged that the Union's Joint-Council--composed of the various unit committeemen--had adopted a rule limiting a member's arguments to three minutes. Attempts to invoke this rule against Rylko at committee meetings were ineffective. Rylko also acknowledged that the Union had filed grievances on behalf of members of the Engineering Division, as of course it was obligated to do. Rylko also acknowledged that a majority of the members present at the contract ratification meeting did in fact vote for its adoption. Rylko also acknowledged that a number of his proposed changes to the Union's proposed contract were in fact adopted by the Union and the membership. 4/

Hodge--a co-employee of Rylko and committeeman--testified, inter alia, that, in his view, Rylko was not argumentative at committee meetings; that Staff Representative Kurshenbaum engaged in "some type of suppression" at the wage survey conference in Washington, D. C., although Hodge could not "recall the exact conversation"; and that Rylko, as an elected committeeman, assertedly could only be removed by the people who voted for him as committeeman. Hodge also expressed his dissatisfaction with the Union and his sympathy with Rylko's opposition to the Union and its staff representatives. Hodge also testified that no vote was taken to remove Rylko as committeeman. Hodge sent Union President Coleman a letter dated July 2, 1971, stating:

> On June 1st, 1971, on or about 2:30 a meeting was held to ratify the Wage Board contract.
> The standards of conduct of labor unions is violated by the following:
> 1) 2-day notice was given of meeting which should have been 2 wks.
> 2) All members were not given a copy of contract prior to meeting so that they could study the contract.
> 3) Balloting was not done at the meeting.
> 4) Everyone was not given the opportunity to debate the contract & given opportunity to add or delete the contract.
> 5) Ratification of contract was rushed thru without knowing whether all were Wage Board members or not.

4/ Finally, Rylko acknowledged that during April 1971, he joined in a campaign to get unit employees into an association at the Hospital, which association was in competition with the Union.

Hodge further testified that the reading of the contract at the ratification meeting took over an hour and, consequently, the members present started to leave the meeting. As a result, Union Representative Cade attempted to expedite the voting on the proposed contract.

Hodge acknowledged that he and Rylko were given the opportunity to write their own proposed contract for the Union committee; that he has since resigned from the Union; that the Council or Committee adopted a 3-minute-limitation-on-argument rule, which Rylko ignored; and that some of Hodge's proposed changes to the initial contract were in fact adopted by the Committee.

III. Respondent's case; the testimony of Union Representative George Smith, Personnel Director George Kvasnicka, Employees Collis Brooks, Albert Bailey and James Atkins

Union Representative George Smith testified, inter alia, that he has been a paid staff member of the Union for some six years; that when he first attempted to organize the Hospital employees involved, he could not sign up a sufficient number of employees to seek a single bargaining unit for all the Hospital employees; that, as a result, he initially organized a separate unit consisting of Wage Board employees and, later, a separate unit of General Schedule employees; and that both units were and are separate and are covered by separate collective-bargaining agreements between the Union and the Hospital. Smith further testified that a Joint-Committee or Council had been established, composed of committee members from both the Wage Board and General Schedule units; and that Rylko was strongly opposed to such a Joint-Committee and often accused Smith "of establishing the [Joint-] Committee so that [Smith] could push through whatever [he] wanted to push through over the objections of the Wage Board Committee." 5/

Smith explained that Rylko would frequently object at Committee meetings to various actions as proposed; that after a vote was taken, Rylko would still persist in his objection and thus "refuse to accept the vote from a majority of the Committee"; and that "on many occasions there were very heated discussions between the various committeemen [and] it came to . . . the verge of fist fights and was

5/ Smith noted that none of the Union's paid staff members had any voting power on the respective committees. Smith also noted that as a consequence of Rylko's criticism of a Joint-Committee, separate Wage Board and General Schedule Committees were maintained.

very chaotic in most of the meetings." In fact, as Smith explained, "A number of other Committee members threatened to leave the Committee because of Rylko's conduct."

Smith testified that there are no provisions in the Union's constitution or bylaws for the removal of a committeeman; that, in his experience, the business agent has the power to appoint committeemen or stewards and the power to remove them; that charges were lodged with the Committee against Rylko, alleging "that they could no longer tolerate his conduct in the meetings and that meetings were fruitless"; and that a majority of members of the Committee voted to remove Rylko as a committee member. This was done at a regular monthly meeting of the Committee. Smith explained: "Well, the actual mechanics of it was that the charges were brought before the Committee that they could no longer tolerate his conduct in the meetings and that the meetings were fruitless and that also the Committee members themselves expressed this. As I recall, there was a vote taken to concur in the removal of Mr. Rylko."

Smith also recalled, as follows:

> In writing a contract under the new Executive Order, Mr. Cade and I spent many weeks writing that contract and with the concurrence of the committee itself. Now, after we completed all we considered to be a good contract, we submitted it to the Committee for their perusal and to see if this was what they want and if they wanted us to give it to the Company. Mr. Rylko and Mr. Hodge wanted to rewrite the whole contract. They accused me and Mr. Cade of trying to take away the rights that they enjoyed under the old contract. I explained to them that this is not the Union's function, to take away rights. It is the Union's function to get as many of the rights that we can. And we believe that we were getting all the rights that were accrued to us on the new Executive Order. Furthermore, I told them that while the contract may be inadequate in his eyes, that he and Rylko were perfectly free to write their own contract and bring it before the Committee for their approval and adoption. They refused to do it. They told me that it was my job. I told them that I did my job and I can't do anymore.

* * *

Smith further testified that the Committee did have copies of the proposed contract for a number of months prior to its adoption in 1971, and that the Committee did recommend and vote changes in the proposed contract. Smith also recalled that the Committee had adopted a 3-minute-limit rule on debate at Committee meetings and that he had warned Rylko that Rylko would be dismissed from the Committee because of Rylko's conduct at committee meetings.

Personnel Director Kvasnicka testified that he declined to permit Rylko to attend weekly union-management meetings concerning problems pertaining to the entire Hospital, since Rylko's jurisdiction as committeeman was confined to only one department--the Engineering Department. Kvasnicka explained that he declined in early 1971 to permit Union personnel to attend committee meetings while on-the-clock because he had been advised that they should not remain on-the-clock under the Executive Order. 6/ Kvasnicka admittedly urged Rylko to work through his Union staff representatives because, under the contract, they were the representatives of the Union charged with responsibility for such matters; in short, Rylko wanted Kvasnicka to discuss with him matters plainly beyond a committeeman's or steward's jurisdiction.

Employee Collis Brooks testified that he had served as a committeeman on the General Schedule Committee for some 5 years; that he--like Rylko--was appointed to this position; that a subcommittee comprised of Rylko, another committeeman and himself proposed to the Committee and the Committee adopted a set of rules and bylaws, including a 3-minute-limitation-on-debate rule; and that Rylko never honored this rule. In Brooks' view, Rylko "had more than an opportunity [to present his views]" at meetings. Rylko assertedly interfered with the business of the Committee. Whenever a resolution was put forth, Rylko "for some reason or another always had an objection to it no matter what it was." Further, Rylko assertedly never supported the positions that the Committee would take.

Brooks recalled the contract ratification meeting of the membership. Rylko and Hodge caused the full contract to be read; Rylko and Hodge started to make objections to it; members started leaving--"They were just tired because they had come to the conclusion that Mr. Hodge and Mr. Rylko didn't have anything to say"; Union Representative Cade attempted to limit Rylko's attempt to dominate the meeting; an attempt was made to invoke the 3-minute rule; finally, Cade had to tell Rylko "to shut up"; Rylko kept talking; "none of the members other than Rylko and Hodge asked for further discussion on the contract"; and ultimately a vote was taken on the contract.

Employee Albert Bailey, also a committeeman, testified that Rylko had ample opportunity to express his views at meetings. The witness was asked, do you have any knowledge whether Rylko ever accepted any resolutions passed by the Committee. The witness answered, "As I recall I don't remember any because we very seldom got past the first stages of the meeting." The witness continued, "Well, it seemed

6/ Rylko had claimed that this change in policy by the Hospital was attributed to him.

that we would get hung up on one point at the beginning of the meetings and regardless of how it was decided or voted on, we would still be on that one point and never be moved into the meeting." After a vote, the witness explained, Hodge and Rylko would continue on as they had before and they would persist in arguing.

The witness further testified, "An example--I can't recall exactly what it was, but it was Mr. Rylko, Lee Jeffrey and Mr. Hodge at one of the meetings. They came in with a petition, I believe it was, I don't remember what the petition was, but this petition. I wasn't a committeeman long enough to be in on this, but it was that they wouldn't bring any more petitions in to the committee meetings. So after this was voted on or discussed among the members and they found out it was true, then they still stayed right on this Committee--I mean on this petition and we never moved any further at this meeting." The Committee sometimes would agree with Rylko's and Hodge's proposals. With respect to those proposals that the Committee rejected, Rylko and Hodge would not accept the Committee's decision. "They continued to argue their point and this is why we never got anywhere in the meetings."

Employee James Atkins, also a committeeman, testified that "one of the reasons they would always get bogged down is the steps--Mr. Rylko and Mr. Hodge always seemed [not to] want no one above them. They wanted to be the representatives of the people, but not use proper steps as set forth, and that means field representatives and the representatives as committeemen. Now the problem I think Mr. Rylko would always run into was trying to bypass the representatives that he could push a grievance through." The witness further testified that Rylko's attitude and actions at Committee meetings upset him as a Committee member. As a result, Atkins apprised the Union "that I would give up my position of Local 73 union representative . . ." The witness added: "If Mr. Rylko and Mr. Hodge was there or Mr. Jeffrey, everybody would leave with a headache. We had women Committeemen that never got a chance to say anything. I think it was one of the meetings that I made the statement that I would not attend if Local 73 did not take part in doing something about these men disrespecting all other members' rights."

Finally, Atkins related what transpired at the contract ratification meeting. He explained that Rylko wanted the contract read. He further explained that a vote of the majority of those present agreed to have the contract read and it was read; members started leaving the auditorium prior to the completion of the reading; the housekeeping women "who were working and had gotten off had to go home and cook"; "the people was leaving because they were reading the whole contract and I think at that time, you /Mr. Cade/ and Mr. Smith had to take turns and I stayed until I got tired and I left and a lot of other people left because it wasn't fair to housekeeping, members of housekeeping, and that is what the meeting was for." 7/

7/ By letter postmarked Sept. 14, 1971, Rylko sent me his brief. There is no indication that this brief was served on respondent. The brief attempts to recite evidence that is not in the record. Accordingly, I reject Rylko's brief and do not rely upon the assertions contained therein.

Further, Hodge's letter postmarked September 14, 1971, attempts to emphasize his testimony. This document is rejected as improper.

Conclusions

A. The applicable principles

Section 204.1 of the Rules and Regulations pertaining to standards of conduct for labor organizations provides:

> * * *Unless otherwise provided in this part or in the [Executive] Order, any term in any section of the [Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 401 et seq.] which is incorporated into this part by reference and any term in this part which is also used in LMRDA, shall have the meaning which that term has under the LMRDA, unless the context in which it is used indicates that such meaning is not applicable. In applying the standards contained in this subpart, the Assistant Secretary will be guided by the interpretations 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 courts.

The principles which have been applied to determine whether or not a union has violated similar sections of the LMRDA are settled. Thus, as the Fifth Circuit stated in Sewell v. Machinists, 445 F.2d 545 , 77 LRRM 2916, 2919-2920 (C.A. 5, 1971):

> * * *[E]ach member of a labor union is guaranteed the right of free expression as well as the right to participate freely in the union's democratic processes. Disciplinary action for the exercise of such rights offends the terms of the Labor-Management Reporting and Disclosure Act. Moreover, the rights of free expression and assembly as well as other rights protected by the statute may be exercised fully and freely by any member of the union; the mere fact that a member is an appointed or elected official of the union does not destroy his statutory rights. [Citations omitted.]

The Court added, however, that this statutory protection does not permit an employee who accepts employment with a union for the performance of certain specified duties to "completely subvert the purposes of his employment by engaging in activities diametrically opposed to the performance of his specified duties." Moreover, it is clear that Rule 204.2(a)(5), quoted supra, does not "preclude summary removal of a member from union office." Grand Lodge v. King, 335 F.2d 340, 341 , 56 LRRM 2639 (C.A. 9, 1964), cert. den., 379 U.S. 920. And, as the Court stated in Airline Maintenance Lodge 702 v. Loudermilk, 444 F.2d 719, 77 LRRM 2721 (C.A. 5, 1971):

> The rights of a union member under this statute must be balanced against the right preserved to the union to make rules as to the responsibility of the member toward the union as an institution. And this balancing process must rest on the facts.

B. Rylko has failed to establish the violations as alleged

Sections 204.2(a)(1), (2) and (5) of the Rules and Regulations set forth the rights of "members" of a labor organization. Rylko, by voluntarily resigning his membership in Respondent Union, has prevented me from effectively remedying any alleged violations of or interference with his rights. Cf. Phillips v. Osborne, 403 F.2d 826 , 69 LRRM 2782, 2785-2786 (C.A. 9, 1968); Axelrod v. Stoltz, F.Supp. , 64 LRRM 2653, 2654 (E.D. Pa. 1967); Cisney v. Local 413, Carpenters, F.Supp. , 58 LRRM 2749. 2750 (N.D. Ind. 1965); Johnson v. Local 58, IBEW, 181 , F.Supp. 734 , 45 LRRM 2685, 2687 (E.D. Mich. 1960). In any event, for the reasons stated below, I find and conclude that Rylko has failed to prove the violations alleged in his complaint.

The testimony of Union witnesses Smith, Brooks, Bailey, Atkins and Kvasnicka--which testimony I credit--makes it clear that Rylko improperly interfered with the Union's Committee meetings. For example, Rylko would persist in raising objections at meetings and in refusing to accept rulings on his objections, so as to prevent the Committee from transacting its regular business. The Union duly promulgated a rule limiting a person's argument time to 3 minutes. Rylko persistently ignored this rule when invoked against him. Smith credibly explained: meetings "came to . . . the verge of fist fights . . ." and were "fruitless". Bailey credibly explained: ". . . we very seldom got past the first stages of the meeting" because of Rylko's conduct. Further, Rylko admittedly would not work through the Union. He circulated anti-Union petitions; he persisted in reading these petitions at meetings; he later joined in an effort to get unit employees into a rival association. Rylko also urged the employer's personnel director to deal with him directly on labor-management problems and, thus, ignore the Union which was the exclusive bargaining representative of the unit employees.

Under these circumstances, and on the record before me, Respondent Union's efforts to limit Rylko's disruptive conduct at meetings and his ultimate removal from the Committee were not violative of Sections 204.2(a)(1), (2) and (5). As for Rylko's other complaints--including those pertaining to the contract ratification meeting and the wage board survey conference in Washington, D. C.--I do not find--under the circumstances present here--Respondent Union interfered with employees' equal rights, freedom of speech and assembly, and safeguards against improper disciplinary action.

Recommendation

In view of my findings and conclusions, as stated above, I recommend that the Assistant Secretary dismiss the complaint filed herein.

Frank H. Itkin
Hearing Examiner

Dated at Washington, D. C.
this 15th day of February, 1972.

May 18, 1972

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

HEADQUARTERS, U. S. ARMY AVIATION
SYSTEMS COMMAND,
ST. LOUIS, MISSOURI
A/SLMR No. 160

This case involved a clarification of unit (CU) petition filed by the Headquarters, U.S. Army Aviation Systems Command (AVSCOM) to "clarify" certain existing bargaining units in order to have them conform to a new organizational structure known as the U. S. Army Aviation Systems Command Headquarters and Installations Support Activity (HISA). More specifically, AVSCOM requested that a single bargaining unit of all Wage Board (WB) employees of the HISA be found appropriate and requested, further, that an election be ordered to determine whether Local 3095, American Federation of Government Employees, AFL-CIO, (AFGE) or Local 149B, International Union of Operating Engineers, AFL-CIO (IUOE) represented the employees involved. Contrary to the Activity, the AFGE and IUOE contended that the formation of HISA constituted merely a paper reorganization of AVSCOM which incorporated the remaining functions of the inactivated Granite City Army Depot, Granite City, Illinois (GCAD), located about eight miles from AVSCOM, and that the units for which they were originally and respectively recognized at AVSCOM and GCAD continued to be viable and appropriate.

In connection with his consideration of this matter, the Assistant Secretary found that a CU petition was an inappropriate vehicle to attain the results sought by AVSCOM - i.e., a determination that certain recognized units are no longer appropriate and an election in an allegedly new single bargaining unit. He noted that AVSCOM should have filed an RA petition which was appropriate in these circumstances. In view of AVSCOM's clearly stated intent, the Assistant Secretary found that it would be overly technical and improper to dismiss its petition on the basis that it had filed the wrong type of petition. Accordingly, he treated AVSCOM's petition as if it had been filed as an RA petition.

The evidence established that as a result of the Activity's reorganization, most of the AFGE unit WB employees at AVSCOM and all of the remaining IUOE unit WB employees at GCAD were reassigned organizationally to the HISA which is a subordinate command of AVSCOM. The Assistant Secretary noted that while certain conditions of employment for the affected employees changed as a result of the reorganization, subsequent to the reorganization and reassignment of personnel there had been no change in the employees' duty stations, missions, immediate supervision or job contacts. Further, there was no evidence of interchange or transfer and no evidence of a substantial identity of job classifications between the two groups of employees involved.

In these circumstances and noting that both the AFGE and the IUOE had indicated their willingness to continue to represent the employees in their respective units and that AVSCOM did not challenge their continued majority status in such units, the Assistant Secretary found insufficient basis to support AVSCOM's contention that the units represented by the AFGE and IUOE were no longer appropriate. Accordingly, he ordered that the petition be dismissed.

A/SLMR No. 160

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

HEADQUARTERS, U.S. ARMY AVIATION
SYSTEMS COMMAND,
ST. LOUIS, MISSOURI 1/

Activity-Petitioner

and

Case No. 62-2443(CU)

LOCAL 3095, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Labor Organization

and

LOCAL 149B, INTERNATIONAL UNION
OF OPERATING ENGINEERS, AFL-CIO

Labor Organization

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Arno C. Cooper. 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 of the parties, the Assistant Secretary finds:

The Petitioner, Headquarters, U. S. Army Aviation Systems Command, St. Louis, Missouri, herein called AVSCOM, seeks a "clarification" of certain existing exclusively recognized bargaining units in order to have them conform to a new organizational structure known as the U. S. Army Aviation Systems Command Headquarters and Installations Support Activity, herein called HISA. More specifically, AVSCOM contends that certain

1/ The name of the Petitioner appears as amended at the Hearing.

recognized units are no longer appropriate and that a single overall bargaining unit of all Wage Board (WB) employees of HISA now is appropriate. In this connection, it requests that an election be ordered to determine whether Local 3095, American Federation of Government Employees, AFL-CIO, herein called AFGE, or Local 149B, International Union of Operating Engineers, AFL-CIO, herein called IUOE, represents the employees in the unit AVSCOM contends is appropriate because of a reorganization. The AFGE and the IUOE contend that the formation of HISA constituted merely a paper reorganization of AVSCOM (which reorganization also incorporated the remaining functions of the previously inactivated Granite City Army Depot, Granite City, Illinois, herein called GCAD) and that the units for which they were recognized originally at AVSCOM and GCAD continue to be viable and appropriate. Furthermore, the IUOE contends that its negotiated agreement with GCAD constitutes a bar to an election. 2/

To achieve its desired results in the subject case -- i.e., a determination that certain recognized units are no longer appropriate and an election in an allegedly new, single, appropriate bargaining unit -- AVSCOM filed a petition for clarification of unit (CU). Under the circumstances of this case, as discussed below, I find that such a petition is an inappropriate vehicle to attain the result sought by AVSCOM. Thus, a CU petition is a vehicle by which parties may seek to illuminate and clarify, consistent with their intent, the unit inclusions or exclusions after the basic question of representation has been resolved. Such a petition provides an activity or a labor organization with a procedure by which the status of certain employees in relation to an existing certified or exclusively recognized unit may be determined. For example, a CU petition could be utilized to resolve the supervisory status of certain disputed employees or to determine whether certain employees fall within the classifications described in the certification or in the exclusively recognized unit. On the other hand, a CU petition is not the proper vehicle to question the appropriateness of an employee bargaining unit or to resolve issues concerning whether or not the unit employees desire to continue to be represented exclusively.

Nor would a petition for amendment of certification (AC) be appropriate in the circumstances of this case. Such a petition may be filed appropriately when parties seek to conform the recognition involved to existing circumstances resulting from such nominal or technical changes as a change in the name of the exclusive representative or a change in the name or location of the agency or activity. As in the case of a CU petition, an AC petition is not a proper vehicle to question the appropriateness of an employee bargaining unit or to resolve issues concerning whether or not the unit employees desire to continue to be represented exclusively.

2/ In this regard, the parties stipulated that there is a current negotiated agreement covering the employees in the GCAD unit represented by the IUOE.

In the subject case, AVSCOM, by seeking a determination that certain exclusively recognized units are no longer appropriate and requesting an election to determine majority status in what it contends to be a newly established appropriate unit, is, in effect, attempting to raise a question concerning representation. Under the Assistant Secretary's Regulations, 3/ the sole procedure available to an agency or activity to enable it to raise a question concerning representation is a petition for an election to determine if a labor organization should cease to be the exclusive representative (RA). Thus, where an agency or activity has a good faith doubt that the currently recognized or certified labor organization represents a majority of the employees in the unit or because of a substantial change, subsequent to recognition or certification, in the character and scope of the unit it contends that the recognized or certified unit is now an inappropriate unit within the meaning of the Order, it may file an RA petition. Thereafter, in appropriate circumstances, and absent a disclaimer of interest by the incumbent labor organization, an agency or activity may obtain an election to ascertain the employees' desire for representation in an appropriate unit.

While, as discussed above, I have found that AVSCOM filed an inappropriate CU petition in this matter, it is clear from the record that by such petition it was, in effect, seeking to raise a question concerning representation based on its view that a reorganization had rendered certain established units inappropriate and that an election should be conducted in a newly established unit. As found above, the appropriate petition in such circumstances is an RA petition rather than a CU petition. However, in my opinion, a dismissal at this post-hearing stage of the proceeding on the sole basis that AVSCOM filed the wrong type of petition in this matter would be overly technical and improper particularly in view of AVSCOM's clear intent. Accordingly, in my consideration of this case, I shall treat AVSCOM's petition as if it had been filed as an RA petition. 4/

Background and Bargaining History Prior to the Reorganization of June 1971

AVSCOM is a major subordinate command of the Army Materiel Command. The AFGE was certified in May 1970, as the exclusive representative in a unit of all nonsupervisory WB employees working at the Headquarters, U.S. Army Aviation Systems Command in St. Louis, Missouri. At the time of certification, this unit included some 53 WB employees (primarily lithographic) engaged exclusively in a support mission for AVSCOM. 5/

3/ Section 202.2(b)

4/ This is not to say, however, that in other circumstances inappropriate petitions will not be subject to dismissal.

5/ While the record indicates the parties executed a dues withholding agreement covering the unit employees, it appears that no other negotiated agreement had been entered into at the time of the hearing.

Although it was also a subordinate of the Army Materiel Command, GCAD, prior to the AVSCOM reorganization, functioned as an entity separate from AVSCOM. The GCAD facility is located approximately eight miles from the Headquarters' facility at which the employees represented by the AFGE are located. On January 17, 1963, the IUOE was granted exclusive recognition by GCAD for a unit of nonsupervisory WB and certain General Schedule (GS) employees. At the time of recognition, this unit included approximately 800 WB and GS employees 6/ engaged in a depot maintenance mission, a supply and distribution mission, and an area support mission. The parties' first negotiated agreement was executed on May 8, 1963, and such agreement has been extended subsequently. The record shows also that prior to the AVSCOM reorganization two other units were granted exclusive recognition by GCAD. In this connection, the IUOE was certified as the exclusive representative in a unit of all nonsupervisory civilian positions in the Commissary Division, Directorate for Services, and the National Federation of Federal Employees, Local 770, herein called NFFE, was granted exclusive recognition in a unit of all nonsupervisory guards in the Security Division, Directorate for Administration.

Reorganization and Reassignment of Personnel

Pursuant to Army Materiel Command directives designed to streamline the organization, HISA was created in June 1971 and had assigned to it the mission of AVSCOM support. Forty-nine of the 53 employees in the AFGE unit who performed such support work were assigned to HISA. Subsequent to a reduction-in-force, two employees, located in the Computer Division and included in the unit represented by the AFGE, remained assigned to AVSCOM. Effective June 30, 1971, GCAD was inactivated and its missions of depot maintenance and supply and distribution were terminated, along with the approximately 800 employees in the unit represented by IUOE. However, GCAD's area support mission, and the 35 employees who were in the unit represented by the IUOE (primarily metal craftsmen, warehousemen or drivers) who performed work in connection with this mission, were reassigned organizationally, along with all of the IUOE commissary employees and the NFFE guard unit employees, to HISA.

Based on this reorganization and the organizational reassignment of personnel, AVSCOM maintains that the original unit for which the AFGE was certified still exists but now includes only the two Computer Division employees who were not assigned organizationally to HISA. Further, AVSCOM takes the position that HISA now is obligated to recognize and bargain with the IUOE for the commissary employee unit and with the NFFE for the guard unit as both were assigned to HISA with no change in their respective missions, working conditions or immediate supervision. 7/ On the other hand, in reference to the WB employees now assigned to HISA who were included in the IUOE and AFGE units, AVSCOM asserts that while these employees remain at their former respective locations, there has been a consolidation of operations and these employees now share a common mission in HISA under the same overall supervision. As noted above, in these circumstances AVSCOM contends that the previously established units no longer are appropriate and that a single unit is now appropriate. It, therefore, seeks an election among all WB employees assigned to HISA.8/

6/ The vast majority of the unit employees were WB.

Conditions of Employment

The record reveals that as a result of the reorganization and the establishment of HISA, overall mission responsibility over all employees in HISA now is consolidated in the Commanding Officer of HISA who reports to the Commanding General of AVSCOM. In addition, a separate competitive bidding area for purposes of reduction-in-force has been established for all WB employees in HISA, including the employees organizationally reassigned from the GCAD; all the HISA employees, including those previously in the GCAD unit represented by the IUOE, are serviced by the AVSCOM Civilian Personnel Office, which also continues to service the two Computer Division employees who remained in AVSCOM; and all employees in HISA are paid by the same finance and accounting office.

On the other hand, the record reveals that the reorganization leading to the creation of HISA had not affected materially the conditions of employment of the two groups of employees in question. In this regard, the record shows that not a single employee's duty station has been changed subsequent to the reorganization and reassignment of personnel. Thus, prior to the organizational reorganization, the employees in AVSCOM who were represented by the AFGE had a single duty station located at the Mart Building in St. Louis, Missouri, while the employees in the GCAD unit represented by the IUOE had two duty stations, a primary duty station located at GCAD in Granite City, Illinois where 26 of the employees were located, and a second duty station at the Mart Building in St. Louis where 9 employees were located. The record discloses that this latter two-duty station organizational structure has been continued for the employees organizationally reassigned to HISA from GCAD and that all employees assigned to HISA from the units represented by the AFGE and IUOE have remained physically at their original work place.

7/ The record reveals that pursuant to a petition for amendment of certification filed by the IUOE, the latter's certification for the Commissary employee bargaining unit has been amended to reflect the administrative transfer of the Commissary from GCAD to HISA.

8/ Despite its above-noted contention, the record reveals that AVSCOM has continued to honor the existing checkoff agreements in the IUOE and AFGE units.

With respect to the mission and duties performed by HISA employees, the record reveals that while all employees are engaged in a support mission, the employees who formerly were in AVSCOM still are responsible exclusively for AVSCOM support, while the employees transferred from GCAD still are responsible exclusively for area support. Further, the record reflects that the types of work performed by the two groups of employees is not closely related and that the employees in the AFGE and IUOE units who have been assigned to HISA are performing the same work, in the same manner and under the same immediate supervision, as they did prior to the reorganization and the organizational reassignment of personnel. 9/ Moreover, the record does not contain any evidence of permanent transfer, interchange, or substantial identity of job classifications as to the two groups of employees involved.

Based on the foregoing, I find insufficient basis to support AVSCOM's contention that the units represented by the AFGE and the IUOE are no longer appropriate. Thus, as discussed above, employees in both of the established units have, subsequent to the reorganization which resulted in the creation of HISA, continued to perform the same work as they performed prior to the reorganization; have remained physically in the same locations; have not interchanged with other employees to any greater extent than prior to the reorganization; have remained under the same immediate supervision; and, although the number of employees in the unit represented by the IUOE has decreased substantially, both units remain viable and clearly identifiable. 10/ In addition, the record shows that both the AFGE and IUOE have indicated their willingness and intent to continue representing employees in their respective exclusively recognized units. 11/ In these circumstances, I shall dismiss the petition herein. 12/

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 62-2443(CU) be, and it hereby is, dismissed.

Dated, Washington, D.C.
May 18, 1972

W.J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

9/ The record shows that the reorganization and the organizational reassignment of personnel was accomplished without any loss of work time for any employee now assigned to the HISA.

10/ Cf. United States Department of Defense, Department of the Navy, Naval Air Reserve Training Unit, Memphis, Tennessee, A/SLMR No. 106.

11/ It was noted that AVSCOM does not challenge the AFGE's or the IUOE's continued majority status in such units.

12/ In view of this disposition, it was considered unnecessary to pass upon the IUOE's contention concerning agreement bar.

May 18, 1972

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

UNITED STATES DEPARTMENT OF THE TREASURY, OFFICE OF REGIONAL COUNSEL, WESTERN REGION
A/SLMR No. 161

The subject case arose as the result of a representation petition filed by Chapter 81, National Association of Internal Revenue Employees, and the National Association of Internal Revenue Employees (NAIRE), seeking a unit of all professional and nonprofessional employees of the United States Department of the Treasury, Office of Regional Counsel, Western Region. The Activity contended that the claimed unit is inappropriate, and that a unit comprised solely of employees in the Office of the Regional Counsel, Western Region, would not ensure a clear and identifiable community of interest, nor would it promote effective dealings and efficiency of agency operations. The Activity also took the position that the attorneys in the proposed unit are management officials or supervisors and, therefore, may not be included in the unit. Moreover, it asserted that inclusion of attorneys in the proposed unit raises a question as to the propriety of attorney membership in and representation by a labor organization which admits to membership non-attorney employees.

The Assistant Secretary found that the regionwide unit sought by the NAIRE was appropriate for the purpose of exclusive recognition. In reaching this conclusion he noted that all employees in the region are subject to the direction of the Regional Counsel; are engaged in a common program with similar program objectives; and that there is minimal interchange between the Activity's regions and few transfers in or out of the Western Region. He noted also that all classifications within the region are covered by the same personnel practices and policies; that the qualifications for employment and work to be performed in the respective job classifications are the same throughout the region; and that the employees within the respective job classifications are subject to the same promotion policies. Further, the Regional Counsel has sole authority to assign and supervise the work of employees within the region and, as necessary, to "cross assign" cases to personnel as the workload demands. In these circumstances, he found that there is a clear and identifiable community of interest among the employees petitioned for by the NAIRE and that such a unit would promote effective dealings and efficiency of agency operations.

In finding that attorneys are not management officials, the Assistant Secretary noted that the attorneys had represented or advised the IRS Regional Commissioner on personnel matters on only three occasions in the

past twenty years and that there was no record evidence that Regional Counsel attorneys have the authority to make, or to influence effectively the making of, policy necessary to the Activity with respect to personnel, procedures, or programs. With respect to the Activity's contention that the attorneys should be excluded under Sections 3(b)(3) and 3(b)(4) of the Order, the Assistant Secretary noted that there was no record evidence to indicate that the head of the Agency had made a specific determination to exclude the Activity's attorney employees under these Sections and, therefore, he found no basis for excluding the Activity's attorney employees under Sections 3(b)(3) and 3(b)(4). The Assistant Secretary found that the question whether the Activity's attorneys are precluded by the American Bar Association (ABA) Canons of Professional Ethics, the ABA Code of Professional Responsibility and opinions of various state bar associations from joining or being represented by a labor organization which admits to membership non-attorneys is an issue that involves the interpretation of the ABA's own rules as well as those of state bar associations, and that such an interpretation is neither determinative nor within the scope of this proceeding. Moreover, he noted that under Section 10(b)(4) of the Order, professional employees, such as attorneys, will have an opportunity to vote whether they desire to be represented at all and, if so, whether they wish to be included in a unit with nonprofessional employees. The Assistant Secretary found that although the NAIRE represents employees of the IRS Western Region who are advised by Regional Counsel attorneys, the inclusion of the attorneys in the petitioned for unit would not result in a conflict of interest, as the employees of IRS and Regional Counsel attorneys are all employees of the same parent organization -- the Department of the Treasury -- and work together in furthering the same overall program objectives.

In these circumstances, the Assistant Secretary directed that an election be held in a unit of all professional and nonprofessional employees of the Office of Regional Counsel, Western Region.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF THE TREASURY, OFFICE OF REGIONAL COUNSEL, WESTERN REGION 1/

Activity

and

Case No. 70-1877 (RO)

CHAPTER 81, NATIONAL ASSOCIATION OF INTERNAL REVENUE EMPLOYEES, and the NATIONAL ASSOCIATION OF INTERNAL REVENUE EMPLOYEES

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Henry C. Lee. 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 parties' briefs, the Assistant Secretary finds:

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

2. The Petitioner, Chapter 81, National Association of Internal Revenue Employees, and the National Association of Internal Revenue Employees, herein called NAIRE, seeks an election in a unit of all professional and nonprofessional employees of the United States Department of the Treasury, Office of Regional Counsel, Western Region, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, supervisors, and guards as defined in Executive Order 11491. 2/

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

2/ The unit appears as amended at the hearing.

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The Activity takes the position that the proposed unit is inappropriate. It contends that a unit comprised solely of employees in the Office of the Regional Counsel, Western Region, would not ensure a clear and identifiable community of interest, nor would it promote effective dealings and efficiency of agency operations. In addition, the Activity contends that the attorneys included in the proposed unit are management officials or supervisors and, therefore, may not be included in the unit sought. Furthermore, the Activity argues that inclusion of attorneys in the proposed unit raises a question as to the propriety of attorney membership in and representation by a labor organization which admits to membership non-attorney employees.

Unit Determination

The Office of Regional Counsel, Western Region, is one of seven Regional Offices which, together with a National Office, constitutes the Office of the Chief Counsel. The Office of the Chief Counsel is a division within the Department of the Treasury's Office of General Counsel. Although the Office of the Chief Counsel functions as the principal legal advisor to the Internal Revenue Service (IRS), it is not a part of the IRS.

Each of the seven Regional Offices of the Office of the Chief Counsel is headed by a Regional Counsel. These regions correspond physically to the regions established by the IRS. Each Regional Counsel has been delegated authority to act as legal advisor to the Regional Commissioner, the Assistant Regional Commissioners, the District Directors, and the Director of the Service Center in the corresponding region of the IRS.

Reporting to the Chief Counsel at the National Office level are two Associate Chief Counsels and the Director of the Operations and Planning Division. 3/ The Associate Chief Counsel (Technical) supervises the Legislation and the Regulations Division and the Interpretative Division, both of which are located solely at the National Office. The Associate Chief Counsel (Litigation) supervises five divisions: Refund Litigation, which is located only in the National Office; and the Alcohol, Tobacco and Firearms (AT&F) Legal Division, the Enforcement Division, the General Litigation Division, and the Tax Court Litigation Division, all four of which have counterparts in the regions. The record reveals that

3/ The Director of Operations and Planning Division is responsible for directing all of the nontax work in the Chief Counsel's Office as well as for budget execution in said Office. Further, the Director provides certain personnel services to the various Regional Counsels.

the Tax Court Litigation Division is the largest Chief Counsel function in the field and that about 50 percent of all Chief Counsel attorneys in the field are engaged in tax court work.

The Office of Regional Counsel, Western Region, 4/ is composed of a headquarters office in San Francisco and five branch offices in Los Angeles, Phoenix, Portland, Salt Lake City, and Seattle. Its employee complement numbers 163 employees, of whom 87 are either attorneys or technical advisors who are classified as professional employees. 5/ The General Litigation and Tax Court Litigation functions are carried out in all Western Region offices. The Enforcement function 6/ is located primarily in the Los Angeles and San Francisco offices, but there is at least one attorney assigned as Enforcement Liaison in the other branch offices. The Alcohol, Tobacco and Firearms Legal Division is located only in San Francisco.

Regional attorneys in the Tax Court Litigation Division represent the IRS Regional Commissioner in the U. S. Tax Court and also advise the Appellate and Audit Divisions of the IRS Western Region on legal problems arising in the course of the administrative processing of tax disputes. The record reveals that the authority of the Regional Counsel to settle a tax dispute case is unlimited in the vast majority of cases. The General Litigation Division handles legal problems in the collection of delinquent taxes. The attorneys in this Division work closely with the IRS Revenue Officers and other employees of the Collection Divisions in the IRS Western Region District Offices. This Division also represents the Government in tax claims litigation before Federal Bankruptcy Courts. The Enforcement Division is responsible for assisting the IRS Regional Commissioner in the preparation of tax fraud cases for prosecution. The attorneys in this Division analyze cases prepared by IRS Intelligence Division investigators in the region. 7/ If the case is determined to be within the standards of prosecution set by the IRS, the Regional Counsel attorneys prepare the referral letter to the Department of Justice, directly transmitting the case for criminal prosecution. Attorneys in the

4/ The Office of Regional Counsel, Western Region, includes the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Utah and Washington.

5/ It was stipulated by the parties, and the record reflects, that the attorneys and technical advisors in the proposed unit are professional employees. The record reveals that a technical advisor generally is an individual who has been educated in accounting, is usually an ex-revenue agent or special agent, and in most instances is also an attorney.

6/ Organizationally, unlike other regions (with the exception of the North Atlantic Region),the Western Region has an Enforcement function.

7/ The Activity's technical advisors assist the attorneys by computing income tax which may be used as a basis for prosecuting a fraud case.

Alcohol, Tobacco and Firearms (AT&F) Legal Division are responsible for rendering legal assistance to IRS Western Region Special Investigators in the development and handling of criminal cases arising under the Alcohol, Tobacco and Firearms and Explosives Act. They also work with the IRS Western Region AT&F Tax Division in connection with reviewing of applications for firearms licenses and for explosives licenses, problems relating to the operation of bonded distilleries and wineries and problems associated with the revocation of permits in these areas. Further, they represent the IRS Regional Commissioner in hearings before Hearing Examiners on appeals of denials of license applications.

General responsibility for the administration of the Office of the Regional Counsel, Western Region, rests with the Regional Counsel and his Assistant Regional Counsels and Staff Assistants. The Regional Counsel is authorized to supervise, review, appraise, and plan the work of the personnel under his jurisdiction. The budget of the Activity is developed by the Regional Counsel and submitted to the National Office which, in turn, issues budgetary authority and responsibility to the Regional Counsel for its execution. Although the National Office has sole authority to assign and transfer professional employees from one division or region to another, to assign and transfer cases between regions and to determine staffing patterns in the region, 8/ the Regional Counsel has authority to assign the work under his jurisdiction to the personnel within his region, including the cross assignment of cases to personnel as the workload demands. The record further reveals that the Regional Counsel has the authority to grant superior performance awards and cash awards up to $150.00 to nonprofessional employees within his region.

With respect to the hiring and promotion of professional employees, the record discloses that the Office of Chief Counsel has no specifically articulated personnel policies, practices, or procedures other than a National Recruitment Program and a National Promotion Plan, applicable only to attorney employees and administered by the Office of Chief Counsel. In administering the National Recruitment Program for attorney employees, the Chief Counsel utilizes attorney personnel from both the National Office and the regions to interview prospective attorney employees from law schools located within the various regions. The National Office selects and appoints the new attorney employees for assignment throughout the Office of Chief Counsel, including the various regions. Under the National Promotion Plan for attorney employees, the National Office sets forth the requirements and qualifications for the promotion of all Chief Counsel attorney employees whose entry grade is at GS-11. The Regional Counsel initiates all recommendations for promotions of attorney employees for

8/ The record reveals that personnel transfers into or out of the Office of the Regional Counsel, Western Region, during the period of 1968 through 1970, averaged 5 percent of the number of employees in the proposed unit.

for GS-12 through 14, and his recommendations are either accepted or rejected at the National Office level.

As to the hiring and promotion of nonprofessional employees, the record reveals that the Regional Counsel has the authority to select and appoint employees GS-5 and below and to recommend nonprofessional employees for promotion in GS-6 through 8.

With regard to grievance processing, the record reveals that the Office of Chief Counsel and its regions follow the grievance procedure as outlined in the Department of the Treasury Manual. Under this procedure an employee is obligated, without exception, to file his grievance initially with his immediate supervisor. Further, the Regional Counsel or his representatives have the authority to recommend disciplinary action against any employee within the region subject to approval or disapproval by the National Office.

Personnel services for the Office of the Regional Counsel in the Western Region are performed by the Personnel Division, IRS Western Region. In this connection, the IRS Western Region provides advice to the Activity in the areas of adverse or disciplinary actions, employee relations, recruitment of nonprofessional employees, employee benefits, retirement computations, and disability retirement actions. The IRS Western Region is obligated to include the employees of the Regional Counsel in established health programs, incentive awards programs, blood programs, fund drives, bond drives, health benefits and similar services. Further, the IRS Western Region is responsible for processing all new employees of the Activity and maintains the official personnel folder for all nonprofessional employees. 9/

The record reveals that the basic qualifications for employees are the same in all regions, and that the employees utilize the same skills, knowledge and techniques as their counterparts in other regions. Further, all Chief Counsel employees utilize the same technical practices and procedures and rules with respect to work performance and their working conditions are essentially the same in all regions.

Based on the foregoing, I find that a regionwide unit of professional and nonprofessional employees, as proposed by the NAIRE, is appropriate for the purpose of exclusive recognition. Thus, the record reveals that all employees in the region are subject to the direction of the Regional Counsel and are engaged in a common program with similar program objectives. Further, the evidence establishes that there is minimal interchange between regions and few transfers in or out of the Western Region; that all classifications of employees within the region are covered by the same personnel

9/ Although the official personnel folder for the Activity's professional employees is maintained at the National Office, an "administrative folder," which is for all practical purposes a complete duplicate of the official personnel folder, is maintained in the region.

practices and policies; that the qualifications for employment and work to be performed in the respective job classifications are the same throughout the region; and that the employees within the respective job classifications are all subject to the same promotion policies. In addition, the Regional Counsel has the authority to select and appoint nonprofessional employees up to the GS-5 level; to recommend promotions for nonprofessional employees through GS-8 and to recommend promotions for professional employees through GS-14. The Regional Counsel also has sole authority to assign and supervise the work of employees within the region and, as necessary, to "cross assign" cases to personnel as the workload demands. In these circumstances, I find that there is a clear and identifiable community of interest among the employees petitioned for by the NAIRE and that such a unit will promote effective dealings and efficiency of agency operations.

Eligibility Issues

The Activity would exclude attorney employees from the claimed unit on grounds that they are supervisors or management officials. 10/ With respect to the supervisory status of attorney employees, the record reflects that non-titled attorneys do not effectively evaluate other employees nor perform any other supervisory functions as set forth in Section 2(c) of the Order. Accordingly, I find that such attorneys are not supervisors within the meaning of the Order. 11/

Although the Activity contends that attorneys are management officials because they represent or advise the IRS Regional Commissioner, Western Region, on legal matters related to personnel actions, the record reveals that attorneys have engaged in such conduct on only three occasions in the past twenty years. 12/ Moreover, there is no record evidence that Regional Counsel attorneys have the authority to make, or to influence effectively the making of, policy necessary to the Activity with respect to personnel, procedures, or programs. 13/ In these circumstances,

10/ At the hearing, the Activity took the position that the attorneys are supervisors. However, in its brief, the Activity made no mention of the supervisory status of attorney employees.

11/ In this connection, it was noted that the parties stipulated that attorney employees who serve from time to time as "backupmen" for trial calendar supervisors are not supervisors.

12/ One instance occurred on an unspecified date, another occurred in the mid-1950's and one occurred in 1949 or 1950.

13/ See Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135.

I find that the petitioned for attorneys are not management officials within the meaning of the Order.

The Activity also contends that because the Regional Counsel attorneys advise certain employees of the IRS Western Region who it asserts have been excluded by the head of the Agency from coverage of the Order under Sections 3(b)(3) and 3(b)(4), 14/ they, likewise, should be excluded under Sections 3(b)(3) and 3(b)(4). 15/ The record contains no evidence to indicate that the head of the Agency in this matter has made a specific determination to exclude the Activity's attorney employees under Sections 3(b)(3) or 3(b)(4) of the Order. In the absence of such evidence, I find no basis to apply Sections 3(b)(3) or 3(b)(4) to the Activity's attorney employees.

With respect to the Activity's contentions that the attorneys in the proposed unit are precluded by the American Bar Association (ABA) Canons of Professional Ethics, the ABA Code of Professional Responsibility, and bar association opinions, both formal and informal, from joining or being represented by a labor organization which admits to membership non-attorney employees, the record reveals that the ABA Canons and Code are a set of standards by which the ABA governs its members' conduct. Although there are no specific prohibitions contained in the ABA Canons or Code against an attorney's joining or being represented by a labor organization which admits to membership non-attorneys, it appears that one formal opinion and several informal opinions issued by several bar associations

14/ Sections 3(b)(3) and 3(b)(4) of the Order provide that provisions of the Order do not apply, respectively, to "any other agency, or office, bureau, or entity within an agency, which has as a primary function intelligence, investigative, or security work, when the head of the agency determines, in his sole judgment, that the Order cannot be applied in a manner consistent with national security requirements and considerations;" or to "any office, bureau or entity within an agency which has as a primary function, investigation or audit of the conduct or work of officials or employees of the agency for the purpose of ensuring honesty and integrity in the discharge of their official duties, when the head of the agency determines, in his sole judgment, that the Order cannot be applied in a manner consistent with the internal security of the agency."

15/ The record reveals that certain employees located in the Intelligence Division, AT&F Tax Division, and Regional Inspectors Office of the IRS Western Region have been excluded by the Secretary of the Treasury under Sections 3(b)(3) or 3(b)(4) of the Order from the exclusive bargaining unit which currently is represented by NAIRE, Chapter 81.

have indicated the possibility that, in certain instances, attorneys' membership in a labor organization would be improper. 16/ The Activity also contends that the Regional Counsel attorneys have an "attorney-client" relationship with IRS employees of the Western Region that would cause an ethical "conflict of interest" if Regional Counsel attorneys were represented by the NAIRE, inasmuch as the employees of IRS Western Region, who are represented currently by the NAIRE, Chapter 81, are advised by the Regional Counsel attorneys in connection with IRS matters.

I find that the question whether attorneys are precluded by the American Bar Association (ABA) Canons of Professional Ethics, the ABA Code of Professional Responsibility and opinions of various state bar associations from joining or being represented by a labor organization which admits to membership non-attorneys is an issue that involves the interpretation of the ABA's own rules as well as those of state bar associations, and that such an interpretation is neither determinative nor within the scope of this proceeding. Moreover, it should be noted that under Section 10(b)(4) of the Order, professional employees, such as attorneys, will have an opportunity to vote whether they desire to be represented at all and, if so, whether they wish to be included in a unit limited to professional employees or in a more comprehensive unit. 17/ I find also that the inclusion of the attorneys in the unit found appropriate would not result in a "conflict of interest" if the attorneys involved were to be represented by the NAIRE. In this connection, the evidence shows that the IRS Regional employees and Regional Counsel attorneys are employees of the same parent organization -- the Department of the Treasury--and that they work together in furthering the same overall program objectives. In these circumstances,I find that no basis for concluding that a conflict of interest could result if the Activity's attorneys are included in the unit requested by the NAIRE.

Based on the foregoing circumstances, I find that the following employees may constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of Executive Order 11491:

> All professional and nonprofessional employees of the United States Department of the Treasury, Office of Regional Counsel, Western Region, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order. 18/

As noted above, 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 the majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of the professional employees as to inclusion in a unit with nonprofessional employees must be ascertained. I, therefore, shall direct separate elections in the following groups:

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

Voting Group (b): All employees of the United States Department of the Treasury, Office of the Regional Counsel, Western Region, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

The employees in the nonprofessional voting group (b) will be polled whether or not they desire to be represented by Chapter 81, National Association of Internal Revenue Employees, and the National Association of Internal Revenue 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 Chapter 81, National Association of Internal Revenue Employees, and the National Association of Internal Revenue Employees. 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).

In the event that a majority of the valid votes of voting group (a) are not cast for inclusion in the same unit as nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit, and an appropriate certification will be issued by the appropriate Area Administrator indicating whether or not Chapter 81, National Association of Internal Revenue Employees, and the National Association of Revenue Employees was selected by the professional employee unit.

16/ However, in an advisory arbitration decision under Executive Order 10988, involving attorneys of the National Labor Relations Board, the arbitrator rejected the categorical nature of these opinions.

17/ In this connection, it was noted that Estate Tax attorneys in the IRS Western Region, who are in the same job classification series as attorneys in the Regional Counsel's Office, currently are in the unit represented by the NAIRE, Chapter 81,and apparently no objection was posed to their inclusion in that unit.

18/ The parties stipulated that the secretary to the Regional Counsel is a confidential employee. As the record does not set forth the duties performed by this employee, I will make no findings as to her status.

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

2. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find that the following two groups of employees 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 United States Department of the Treasury, Office of Regional Counsel, Western Region, excluding all nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined by the Order.
>
> (b) All employees of the United States Department of the Treasury, Office of Regional Counsel, Western Region, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate as early as possible, but not later than 45 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 by Chapter 81, National Association of Internal Revenue Employees, and the National Association of Internal Revenue Employees.

Dated, Washington, D. C.
May 18, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

May 23, 1972

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

ST. LOUIS REGION,
UNITED STATES CIVIL
SERVICE COMMISSION,
ST. LOUIS, MISSOURI
A/SLMR No. 162

This case arose as a result of a representation petition filed by the American Federation of Government Employees, AFL-CIO, Local 4 (AFGE) for a unit of all employees of the St. Louis Region of the Civil Service Commission. While the parties agreed upon the appropriate unit, questions arose as to whether certain employees were engaged in Federal personnel work in other than a purely clerical capacity and, therefore, should be excluded from the petitioned for unit.

The Assistant Secretary found that the claimed unit of all employees of the St. Louis Region was appropriate for the purpose of exclusive recognition, in that they shared a clear and identifiable community of interest and such a unit, in his view, would promote effective dealings, and efficiency of agency operations. In this connection, the Assistant Secretary noted that the claimed employees are all under the direction of the same Regional Director, are engaged in the same overall mission, perform essentially the same type of work, are subject to the same personnel policies and grievance procedures, are transferred within the Region as needs dictate, and are subject to the same promotion policies.

In the course of this proceeding, the Activity indicated there was a substantial question as to whether all Civil Service Commission employees fall within the meaning of Section 10(b)(2) of Executive Order 11491, which excludes from any unit employees engaged in Federal personnel work in other than a purely clerical capacity. The Assistant Secretary noted that while the Order specifically excluded certain agencies, and provided a method for excluding certain other employees from coverage, the Commission was not excluded specifically from coverage under the Order, and that the Commission has interpreted the Order to cover many of its employee categories. Therefore, he found there was no basis for concluding that all Commission employees were excluded from the coverage of the Order. Moreover, the Assistant Secretary concluded that employees in the questioned classifications, Personnel Management Specialists and Personnel Staffing Specialists, should not be excluded from the unit found appropriate by virtue of Section 10(b)(2) of the Order, because the Federal personnel work they perform is for employees outside the claimed unit and their agency. However, the Assistant Secretary noted that under Section 25(a) of the Order the Commission is given certain responsibility for administering the Order and, further, that under Section 3(d), employees engaged in administering the Order may not be represented by a labor organization, such as the AFGE, which represents other employees. In these circumstances, he excluded from the unit those employees engaged in performing Section 25(a) functions.

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

A/SLMR No. 162

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ST. LOUIS REGION,
UNITED STATES CIVIL
SERVICE COMMISSION,
ST. LOUIS, MISSOURI

Activity

and

Case No. 62-2659(RO)

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL No. 4

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Arno C. Cooper. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 1/

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

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

2. The Petitioner, American Federation of Government Employees, AFL-CIO, Local No. 4, herein called AFGE, seeks an election in a unit of all nonsupervisory employees in the St. Louis Region of the United States Civil Service Commission, herein called the St. Louis Region, including professional employees, but excluding all management officials, supervisors, employees involved in administering Executive Order 11491, or furnishing guidance with reference to the administration of Executive Order 11491, guards, employees assigned to the Evaluation Branch, employees in Area Offices who devote a substantial amount of their time to evaluation functions, confidential employees who act in a confidential capacity to employees who are engaged in the formulation of labor relations policy, and employees engaged in internal Federal personnel work affecting the employees in the St. Louis Region in other than a clerical capacity. 2/

Although the AFGE and the St. Louis Region apparently agreed upon the composition of the proposed unit, a question arose under Section 10(b)(2) of the Order as to the eligibility of employees in three job classifications; Personnel Management Specialist, Personnel Staffing Specialist, and Personnel Clerical and Assistance. 3/

Unit Determination

The Civil Service Commission, hereinafter called the Commission, develops and makes legislative policy and program recommendations regarding personnel management to the President and to the Congress, affecting all Federal employees. In addition, under a number of basic statutes and executive orders,the Commission has administrative responsibilities for major personnel programs. The record reveals that the Commission is engaged in developing classification standards, developing and administering examinations, and recruiting employees for positions in all Federal agencies. Further, it conducts investigations based on security levels established by a hiring agency; issues policy guidance and regulations to Federal agencies concerning hiring practices, promotions and other aspects of Federal employment; trains employees; develops training programs which operating agencies implement; has overall responsibility for the Federal employee retirement, health and insurance programs; and has an adjudicatory function through which employees from all agencies may obtain review of adverse personnel actions. The record reveals that the Commission is governed by the policy guidance and regulations established through its own internal personnel policies to the same degree as other Federal agencies. To perform the functions set forth above, the Commission operates a network of Regional Offices which provide services to Federal agencies. The Regional Office functions include preparation of qualifications for positions;

1/ Subsequent to the close of the hearing a joint motion to correct the official transcript was submitted by the parties to the Hearing Officer who ruled the motion was untimely. The Petitioner moved that the Hearing Officer be overruled and that the stipulated corrections be accepted. As the requested corrections in no way change the content or meaning of the record, and in the interest of establishing a complete factual record, I shall accept the parties' joint stipulation and the transcript is modified accordingly.

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

3/ Section 10(b)(2) of the Order prohibits the inclusion, in any appropriate unit, of employees engaged in Federal personnel work in other than a purely clerical capacity. Initially, the Activity indicated its disagreement with the principle set forth in Army and Air Force Exchange Service, White Sands Missile Range Exchange, White Sands Missile Range, New Mexico, A/SLMR No. 25, that the Assistant Secretary is not bound to accept a consent election agreement approved by the parties and, therefore, it contended that a consent election agreement should have been approved in this case. However, at the hearing and in its brief, it indicated that there was a substantial question as to whether all Civil Service Commission employees fall within the exclusion of Section 10(b)(2) of the Order. See also, in this regard, footnote 5 below.

recruiting for Federal employment; examining and certifying eligible candidates; promulgating policy guidance on personnel practices; evaluating agency personnel management practices; administering health benefit and retirement programs; adjudicating employee appeals; and advising agencies in the regional area on such matters.

The St. Louis Region is one of the ten Regions of the Commission. The record establishes that the St. Louis Region includes a Regional Office, a Records Section, and five Area Offices. 4/ It appears from the record that the St. Louis Region employs approximately 199 employees. The record discloses that the employees in the St. Louis Region are engaged in the same overall mission, are under the direction of the same Regional Director, perform essentially the same types of work and are subject to the same personnel policies and grievance procedures, regardless of their location within the Region. Moreover, the evidence establishes that employees in the St. Louis Region are transferred from one office to another within the Region as needs dictate, are subject to the same promotion policies, and are paid from one central payroll office.

Based on the foregoing circumstances, I find that a unit composed of all employees of the St. Louis Region is appropriate for the purpose of exclusive recognition in that they share a clear and identifiable community of interest. Moreover, in my view, such a unit would promote effective dealings and efficiency of agency operations. Accordingly, I shall direct an election in the unit found appropriate.

Eligibility Issues

As previously indicated, questions arose as to the eligibility of employees in certain job classifications.

Personnel Management Specialists and Personnel Staffing Specialists

The record shows that there are Personnel Management Specialists (Personnel Management Advisors) in the Regional and Area Offices who administer the Commission's personnel management evaluation program. Under this program they, among other things, evaluate other agencies' staffing and personnel programs, including labor relations policies; and they make recommendations and furnish technical advice to agency management with reference to the implementation and administration of Executive Order 11491. These program evaluation functions are performed solely for other operating agencies and not for the Commission. The record shows also that the Personnel Staffing Specialists assist other Federal agencies, through the competitive examining system, in meeting their staffing needs. The services they provide to agencies include the development of announcements of staffing needs, the preparation of qualification standards and rating schedules, and

4/ Area Offices are located in St. Louis, Missouri; Omaha, Nebraska; Wichita, Kansas; Des Moines, Iowa; and Kansas City, Missouri.

assistance in the training of expert rating panels. They also give advice to other agencies on flexibilities in the merit system and act in response to public policy directives of the President and agency heads.

Under the foregoing circumstances, it appears that employees classified as Personnel Management Specialists and Personnel Staffing Specialists are involved in Federal personnel work in other than a purely clerical capacity. However, in my view, the Section 10(b)(2) exclusion would not be applicable where, as here, the employees involved perform Federal personnel work in connection with employees who are employed outside the claimed unit and, indeed, outside their own agency. In such circumstances, the potential conflict of interest and responsibility which Section 10(b)(2) was intended to cover would not appear to be present. Accordingly, I find that the Activity's Personnel Management Specialists and Personnel Staffing Specialists would not be excluded from the claimed unit by virtue of Section 10(b)(2) of the Order. 5/

However, despite the inapplicability of the Section 10(b)(2) exclusion to these employees, it appears that the exclusion of some or all of such employees from the claimed unit would be warranted on the basis of other relevant sections of the Executive Order. Thus, Section 25(a) of the Order places upon the Commission certain responsibility for guiding and assisting agencies in development of their labor-management relations programs. 6/ And, Section 3(d) provides that:

5/ As noted above, the Activity also questioned, at the hearing and in its brief, whether all employees of the U.S. Civil Service Commission are involved in Federal personnel work within the meaning of Section 10(b)(2) of Executive Order 11491 and, thereby, should be excluded from the coverage of the Order. While the Order specifically excludes agencies such as the FBI and CIA and provides a method by which certain other groups of employees engaged in internal audit and internal security may be excluded from coverage, the Civil Service Commission is not excluded specifically from the coverage of the Executive Order as an entity. Moreover, it appears that the Commission has interpreted the Order to cover many of its employee categories and, in fact, has recognized exclusively labor organizations at its National Office and in at least one Regional Office. Under the circumstances, I find no basis to conclude that all Civil Service Commission employees were intended to be excluded from the coverage of the Order.

6/ Section 25(a) provides: "(a) The Civil Service Commission, in conjunction with the Office of Management and Budget, shall establish and maintain a program for the policy guidance of agencies on labor-management relations in the Federal service and periodically review the implementation of these policies. The Civil Service Commission shall continuously review the operation of the Federal labor-management relations program to assist in assuring adherence to its provisions and merit system requirements; implement technical advice and information programs for the agencies; assist in the development of programs for training agency personnel and management officials in labor-management relations; and, from time to time, report to the Council on the state of the program with any recommendations for its improvement."

"Employees engaged in administering a labor-management relations law or this Order shall not be represented by a labor organization which also represents other groups of employees under the law or this Order, or which is affiliated directly or indirectly with an organization which represents such a group of employees."

In my view, a reading of the foregoing sections of the Order requires the conclusion that those employees of the Commission who carry out the Commission's responsibilities under Section 25(a) of the Order may not, under Section 3(d), be represented by a labor organization which represents other groups of employees under the Order or which is affiliated directly or indirectly with an organization which represents such a group of employees. As the record reflects that some or all of the Personnel Management Specialists and Personnel Staffing Specialists are engaged in assisting agencies with respect to programs undertaken in connection with Executive Order 11491, I find that such employees may not be represented by a labor organization, such as the AFGE, which represents other employees under the Order. Accordingly, those Personnel Management Specialists and Personnel Staffing Specialists whose work involves administering the Federal labor-management program should be excluded from the unit found appropriate. 7/

Personnel Clerical and Assistance

Employees in this job classification handle and maintain registers, cards, and certificates, and rate job applications according to strict guidelines set by the Commission. The record indicates that their duties are repetitive, routine and purely clerical, and do not involve the exercise of independent discretion. In these circumstances, I find that because the Personnel Clerical and Assistance employees are engaged in purely clerical functions they should be included in the unit found appropriate.

The Region also employs several management interns who are subject to the same personnel policies as other Regional employees. Additionally, there are several employees, classified as "WAE's" or "career intermittent," who have been employed for several years, and who work under the same conditions and regulations and receive pay at the same grade level as other Regional employees. As the record indicates that both the management interns and "WAE's" have a reasonable expectancy of continued employment and as both groups work under similar terms and conditions as other employees

7/ For the same reasons, I shall exclude from the unit found appropriate the Labor Relations Officer who provides advice and guidance to other agencies concerning the administration of Executive Order 11491, and the Director of the Personnel Management Training Institute who provides training to agencies in labor relations matters.

within the petitioned for unit, I shall include them in the unit found appropriate.

Further, the AFGE requested the inclusion within the unit of 3 temporary employees. One of these employees is a college professor, hired during the summer vacation period, to evaluate the St. Louis operation and develop "new ideas." The record reveals that a new professor apparently is hired each summer from a local college or university to perform this job function. With respect to the two other temporary employees sought to be included, although it appears that they enjoy the same job benefits as a permanent employee, there is no evidence they have been employed in the past or that they will be employed in the future. As there is no evidence that the 3 temporary employees have a reasonable expectancy of continued employment, I shall exclude them from the unit found appropriate.

The parties agreed and the record shows that the secretaries to the Regional Director, the Deputy Regional Director, and the Labor Relations Officer, and the clerical assistant to the Personnel Officer, work in a confidential capacity to officials engaged in the formulation and effectuation of labor relations policy for the St. Louis Region. Accordingly, I shall exclude them from the unit on the basis that they are confidential employees. Additionally, the record discloses that employees in certain other positions designated as supervisory (e.g., Area Managers, Branch Chiefs,Supervisory Clerks), in fact, direct, assign, and evaluate other employees or make recommendations which customarily are followed. Such classifications, therefore, should be excluded from the unit found appropriate on the basis of their supervisory status.

Based on the foregoing, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491:

All employees in the St. Louis Region, United States Civil Service Commission, including professional employees 8/ and employees classified as Personnel Clerical and Assistance, but excluding temporary employees, confidential employees, employees engaged in internal Federal personnel work in other than a purely clerical capacity, employees engaged in performing Commission functions pursuant to Section 25(a) of Executive Order 11491,9/ management officials, and supervisors and guards as defined in the Order.

8/ The record reflects that there are two registered nurses in the Region who clearly qualify as professional employees.

9/ This exclusion, of course, would include those employees assigned to the Evaluation Branch and the Area Offices who are engaged in performing Commission functions pursuant to Section 25(a) of the Order.

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

Voting Group (a): All professional employees of the St. Louis Region, United States Civil Service Commission, excluding all nonprofessional employees, temporary employees, confidential employees, employees engaged in internal Federal personnel work in other than a purely clerical capacity, employees engaged in performing Commission functions pursuant to Section 25(a) of Executive Order 11491, management officials, and supervisors and guards as defined in the Order.

Voting Group (b): All employees of the St. Louis Region, United States Civil Service Commission,including employees classified as Personnel Clerical and Assistance, excluding professional employees, temporary employees, confidential employees, employees engaged in internal Federal personnel work in other than a purely clerical capacity, employees engaged in performing Commission functions pursuant to Section 25(a) of Executive Order 11491, management officials, and supervisors and guards as defined in the Order.

The employees in the nonprofessional voting group (b) will be polled whether or not they desire to be represented by the AFGE.

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 by the AFGE. 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 nonprofessionals, the ballots of voting group (a) shall be combined with those of voting group (b).

In the event that a majority of the valid votes of voting group (a) are not 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 AFGE 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 St. Louis Region, United States Civil Service Commission, including employees classified as Personnel Clerical and Assistance, excluding temporary employees, confidential employees, employees engaged in internal Federal personnel work in other than a purely clerical capacity, employees engaged in performing Commission functions pursuant to Section 25(a) of Executive Order 11491, management officials, and supervisors and guards as defined in the Order.

2. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find that the following two groups of employees will constitute separate units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

(a) All employees of the St. Louis Region, United States Civil Service Commission, including employees classified as Personnel Clerical and Assistance, excluding all professional employees, temporary employees, confidential employees, employees engaged in internal Federal personnel work in other than a purely clerical capacity, employees engaged in performing Commission functions pursuant to Section 25(a) of Executive Order 11491, management officials, and supervisors and guards as defined in the Order.

(b) All professional employees of the St. Louis Region, United States Civil Service Commission, excluding all nonprofessional employees, temporary employees, confidential employees, employees engaged in internal Federal personnel work in other than a purely clerical capacity, employees engaged in performing Commission functions pursuant to Section 25(a) of Executive Order 11491, management officials, and supervisors and guards as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 45 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations.

Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause, since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, AFL-CIO, Local No. 4.

Dated, Washington, D. C.
May 23, 1972

W.J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

May 31, 1972

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

DEPARTMENT OF THE ARMY,
MEDICAL DEPARTMENT ACTIVITY,
FORT HUACHUCA,
FORT HUACHUCA, ARIZONA
A/SLMR No. 163

This case arose as a result of a representation petition filed by the American Federation of Government Employees, AFL-CIO, Local 1662, (AFGE) for a unit of all employees of the Medical Department Activity at Fort Huachuca, Arizona. At issue was the question of whether the GS-7 civilian registered nurses are supervisors within the meaning of the Order.

The Assistant Secretary found that the civilian registered nurses (staff nurses) were not supervisors. In this connection, he noted that while all the staff nurses act for clinical head nurses, on a rotating basis, during evening and night shifts, it is clear that they work within established guidelines as leaders of trained teams, rather than in a supervisory capacity; and that there is no record evidence that staff nurses on such shifts have, in fact, disciplined or evaluated other shift personnel or have otherwise exercised supervisory authority.

The Assistant Secretary found also that insufficient evidence had been adduced at the hearing to permit a determination as to the appropriateness of the unit sought. He noted that evidence was lacking concerning the relationship of the employees in the claimed unit with other employees at Fort Huachuca; that there was little or no evidence concerning employees in the claimed unit other than registered nurses; and that there was no evidence with respect to whether any of the employees at the Activity were covered by exclusive recognitions, and if so, who represented such employees. Accordingly, the Assistant Secretary remanded the case to the Regional Administrator to reopen the record and secure additional evidence concerning the appropriateness of the unit sought.

A/SLMR No. 163

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,
MEDICAL DEPARTMENT ACTIVITY,
FORT HUACHUCA,
FORT HUACHUCA, ARIZONA 1/

Activity

and

Case No. 72-RO-2831(25)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO,
LOCAL 1662

Petitioner

DECISION AND REMAND

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Patrick A. Lavin. 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, American Federation of Government Employees, AFL-CIO, Local 1662, herein called AFGE, seeks an election in a unit of all employees, including professionals, of the Medical Department Activity at Fort Huachuca, Arizona, excluding supervisors, management officials, guards, employees engaged in Federal personnel work in other than a purely clerical capacity, as well as part-time and casual employees. 2/

Contrary to the AFGE's position, the Activity contends that all the GS-7 civilian registered nurses are supervisors within the meaning of the Order, and, therefore, should be excluded from the claimed unit.

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

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

The Medical Department Activity at Fort Huachuca, Arizona, is comprised of the Raymond W. Bliss Army Hospital, Veterinary Activities, and Dental Activities. The Nursing Service at the Raymond W. Bliss Army Hospital consists of six sections: Medical Nursing Section, Surgical Nursing Section, Centralized Material Section, Neuropsychiatric Clinic, Operating Room, and Anesthesiology. The record indicates that there is a clinical head nurse in each of the Hospital's three wards, as well as in its intensive care unit, emergency room, and outpatient clinics. These clinical head nurses, who apparently are all U. S. Army nurses, report to the Assistant Chief Nurse, who is a Lieutenant Colonel. The latter, in turn, reports to the Chief, Nursing Service, who is a Colonel.

The Nursing Service operates on three shifts. The clinical head nurses customarily work the day shift, Monday through Friday. Directly under the head nurses are the civilian registered nurses in question, who are referred to as "staff" or "charge" nurses. All civilian staff nurses at the Activity rotate to the evening and night shifts in the regular course of their employment.

The concept of team nursing prevails at the Raymond W. Bliss Army Hospital. Thus, the personnel in wards or other hospital units are considered a nursing team which may include Licensed Practical Nurses, Army Corpsmen and WACs. The clinical head nurses, who are on 24-hour call, develop nursing plans and meet with oncoming evening and departing night shift personnel to discuss patient condition and care. In addition, a Medical Officer of the Day and an Administrative Officer of the Day are both available to the staff nurses who are on ward duty during evening and night shifts. The record indicates that staff nurses on evening or night shifts may check with the staff nurse on duty in Ward 2 who is considered by the Activity to be an overall supervisor during such shifts.

While the Activity asserts that the staff nurses possess the authority to assign, direct, discipline, transfer, and evaluate nonprofessional personnel in the wards while on their evening or night shifts, there is no record evidence that any staff nurses have, in fact, exercised such authority, or that they have made effective recommendations in this regard.

In these circumstances, I find that the staff nurses are not supervisors within the meaning of the Order. Thus, while the record shows that all staff nurses act for clinical head nurses at certain times on a rotating basis, during evening and night shifts, it is clear that they work within established guidelines as leaders of trained teams rather than in a supervisory capacity. In this regard, there is no record evidence that staff nurses, when assigned to such shifts have, in fact, disciplined or evaluated other shift personnel or have otherwise exercised supervisory authority. Accordingly, I find that the GS-7 registered nurses at the Activity may be included in any unit found appropriate. 3/

3/ The evidence was also considered insufficient to establish that the staff nurse in Ward 2 at the Activity was a supervisor within the meaning of the Order.

With respect to the appropriateness of the unit sought, I find that insufficient evidence was adduced to permit a determination whether employees in the proposed unit share a clear and identifiable community of interest. Thus, evidence is lacking as to their relationship with other employees at Fort Huachuca. Moreover, with respect to employees in the claimed unit, the record evidence is limited to the duties and responsibilities of the registered nurses and there is little or no evidence concerning other employees sought to be included. In addition, at the hearing the proposed unit was amended by stipulation of the parties to include employees already covered by exclusive recognitions. However, there was no information as to whether, in fact, there are any employees in the claimed unit covered under exclusive recognitions and, if so, who represents such employees.

In order to determine whether the unit sought is appropriate the record should show, among other things, the number, job classifications, skills, work performed, and supervision of the employees in the claimed unit. The record should reflect also information regarding the relationship of the claimed employees with the other civilian employees at Fort Huachuca, the extent of interchange and transfers, if any; the area of consideration in promotions and reductions-in-force; the similarity of personnel policies, wages and other benefits with respect to the claimed employees and other civilian employees at Fort Huachuca; and the supervisory and administrative hierarchy under which employees in the claimed unit work. Moreover, the record should show whether there are employees already covered by exclusive recognition at the Activity and, if so, who represents them and are they covered by negotiated agreements. Evidence also should be adduced as to whether the AFGE intends to include within its claimed unit, employees already covered in exclusive recognition and, if so, the basis therefore. Further, while the petition herein was amended to exclude and then to include "temporary" employees, and presently would exclude "casual" and "part-time" employees, there is no record evidence as to the nature of the duties, pay, benefits or supervision of any such employees, or their relationship to other employees in the claimed unit and their expectancy of future employment.

Because, in my view, the record does not provide an adequate basis on which to determine the appropriateness of the claimed unit, I shall remand the subject case to the appropriate Regional Administrator for the purpose of reopening the record and securing additional evidence, in accordance with the discussion above, concerning the appropriateness of the unit sought by the AFGE.

ORDER

IT IS HEREBY ORDERED that the subject case be, and it hereby is, remanded to the appropriate Regional Administrator.

Dated, Washington, D. C.
May 31, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

May 31, 1972

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

THE AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO
JOHN F. GRINER, NATIONAL PRESIDENT
A/SLMR No. 164

This case resulted from a complaint filed by Paul L. Lamon against the American Federation of Government Employees (AFGE) and John F. Griner, its National President, alleging violations of Section 204.2(a)(1) and Section 204.2(a)(2) of the Regulations implementing Executive Order 11491. The case was presented for a decision on the basis of a joint stipulation of facts and issues and briefs filed by the parties, in lieu of a hearing.

Complainant is a member of AFGE and is employed by AFGE as a National Representative. He was elected by his local as an alternate delegate to AFGE's 1970 Convention. However, he was denied his seat at the Convention because Article VI, Section 10 of the AFGE constitution prohibits any paid employee of AFGE except an elected officer from being a convention delegate.

Article VII, Section 8 of the AFGE constitution prohibits paid employees of AFGE from being candidates for any elective office within AFGE while remaining on the payroll and states that "Any announcement as to candidacy or resignation of said employee, shall be made at least thirty days prior to the convening of any National Convention."

AFGE has recognized the Federation of National Representatives (FNR) as the exclusive collective bargaining agent for the National Representatives and Article XIV, Section 2 of the collective bargaining agreement between AFGE and FNR states that "The National Representatives will not be in attendance at any caucus during the nominations of National Vice President or at the National Convention during the nomination and election of National Officers." On July 23, 1970, AFGE President Griner issued a directive to all employees stating that any participation by paid employees in national politics at the AFGE 1970 Convention would result in disciplinary action against them.

Five issues were stipulated. The first was whether Article VI, Section 10 of the AFGE constitution which prohibits paid employees from being delegates to national conventions violates Section 204.2(a)(1) or Section 204.2(a)(2) of the Regulations. The Assistant Secretary found that there was no violation because the right to be a candidate for union office is not protected by either of those sections. Complainant's proper procedure for challenging the constitutional provision, the Assistant Secretary stated, would have been to challenge the delegate election through a complaint filed under Section 204.63 of the Regulations.

The second issue was whether Article VII, Section 8 of the AFGE constitution which prohibits paid employees of AFGE from running for any elective office while remaining on the union payroll violates Section 204.2(a)(1) or Section 204.2(a)(2) of the Regulations. The Assistant Secretary found that this constitutional provision was also a requirement for candidacy and as such did not present an issue under Section 204.2 of the Regulations.

The third issue was whether the provision in the AFGE-FNR collective bargaining agreement violated Section 204.2(a)(1) or Section 204.2(a)(2) of the Regulations. The Assistant Secretary found that the equal rights provisions of Section 204.2(a)(1) were not violated by this provision in the collective bargaining agreement because caucuses and conventions are not membership meetings since attendance (other than as spectators or visitors) and participation are restricted to properly elected delegates and alternates. Section 204.2(a)(2) of the Regulations guarantees members of labor organizations freedom of speech and assembly subject to the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution. The Assistant Secretary found that the provision was such a reasonable rule because restricting National Representatives' participation in national union politics has the effect of eliminating a potential conflict of interest between the duty of a National Representative to the Respondent labor organization and the use of his position as a National Representative to advance the special interests of a particular candidate or a particular faction within such organization. Therefore, there was no violation of Section 204.2(a)(2) of the Regulations.

The fourth issue was whether President Griner's directive stating that any participation by paid employees in national politics at the AFGE 1970 Convention would result in disciplinary action against them violated Section 204.2(a)(1) or Section 204.2(a)(2) of the Regulations. The Assistant Secretary found that the directive did not violate the equal rights provisions of Section 204.2(a)(1) because, as indicated above, it is not possible to conclude that conventions are membership meetings. The Assistant Secretary found that the directive was the implementation of a rule which has the effect of keeping employee-members from becoming involved in national union politics to the detriment of the union as a whole because of a potential conflict of interest between the duty of a National Representative to the Respondent labor organization and the use of his position as a National Representative to advance the special interests of a particular candidate or a particular faction within such organization. Therefore, the directive was a reasonable rule as to the responsibility of every member toward the organization as an institution and was consistent with the provision in Section 204.2(a)(2) permitting the adoption and enforcement of such rules.

The fifth issue was whether the Complainant was denied the rights provided by Section 204.2(a)(1) and Section 204.2(a)(2) of the Regulations when he was denied the right to attend and participate in the affairs of AFGE's 1970 Convention. The Assistant Secretary found that there was no violation because neither the right to be a delegate nor the right to participate in a convention "as a delegate" is protected by Section 204.2(a)(1) or Section 204.2(a)(2).

For the reasons described above, the Assistant Secretary dismissed the complaint.

A/SLMR No. 164

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
JOHN F. GRINER, NATIONAL PRESIDENT

Respondent

and Case No. 50-4750

PAUL L. LAMON

Complainant

DECISION AND ORDER

This proceeding under Executive Order 11491, and Part 204, Chapter II, Code of Federal Regulations, Standards of Conduct for Labor Organizations, arose as a result of a complaint filed with the Chicago Area Administrator of the Labor-Management Services Administration (LMSA) by Paul L. Lamon against the American Federation of Government Employees (AFGE) and its National President, John F. Griner, on October 5, 1970, alleging violations of section 204.2 of the Regulations. On March 3, 1971, the Chicago Regional Administrator dismissed the complaint pursuant to section 204.58 of the Regulations. The Complainant appealed the decision of the Regional Administrator pursuant to section 204.59, and on April 13, 1971, I reversed the decision of the Regional Administrator and directed him to reinstate the complaint and issue a notice of hearing. In accordance with the request by the counsel for both parties and the execution of a waiver of hearing rights, it was agreed that in lieu of a hearing the matter would be presented for a decision on the basis of a joint stipulation of facts and issues and briefs filed by the parties. Identical signed copies of the stipulation of facts and issues were received from the attorney for the Complainant, dated August 4, 1971, and the attorney for AFGE, dated August 5, 1971.

Summary of Stipulated Facts

The Complainant has been a member of AFGE Local No. 1415 since March 1, 1952, and has been employed by AFGE as a National Representative since May 1, 1961. As such employee he is represented for collective bargaining purposes with his employer (AFGE) by this Federation of National Representatives, Local 1 (FNR).

The Complainant was elected by Local 1415 to be an alternate delegate to the AFGE National Convention held during the week of August 10, 1970. By letter dated July 16, 1970, AFGE National Vice President A. K. Gardner, who was also the Chairman of the 1970 Convention Credentials Committee, informed the President of Local 1415 that the Complainant was ineligible to be an alternate delegate by reason of Article VI, Section 10 of the AFGE National Constitution. This section reads: "No person who is a paid employee of the Federation and not an elected officer shall be a delegate to any National Convention of the Federation."

By letter dated July 22, 1970, the AFGE National Secretary-Treasurer again advised the President of Local 1415 that the Complainant was not eligible to be a delegate or an alternate delegate. A copy of this letter was also sent to the Complainant and requested him to submit his credentials for cancellation.

Article VII, Section 8 of the AFGE constitution states: "No paid employee, as distinguished from an elected officer of the American Federation of Government Employees, may be a candidate for any elective office within the AFGE while remaining on the payroll of the AFGE. Any announcement as to candidacy or resignation of said employee, shall be made at least thirty days prior to the convening of any National Convention."

The collective bargaining agreement between the Federation of National Representatives, Local 1 (FNR) and AFGE, which became effective prior to the effective date of the Regulations, provides in Article XIV, Section 2 that: "The National Representatives will not be in attendance at any caucus during the nominations of National Vice President or at the National Convention during the nomination and election of National Officers."

On July 23, 1970, AFGE President Griner issued a directive to the National Executive Council, William J. Smith, Director of Organization, the National Representatives and the heads of departments which stated that any lobbying for or against any resolution coming before the National Convention would be considered participation in national politics, anyone found guilty of such action would be subject to discipline, and any employee found guilty of campaigning for or against any candidate for National Office would be summarily dismissed from the Federation.

The Complainant was denied the right to participate in the 1970 Convention by duly authorized agents of AFGE.

Motion for Dismissal

Respondents moved that the complaint be dismissed on the grounds that the Complainant had failed to exhaust his internal union remedies as required by sections 204.54 and 204.55(b) of the Regulations. Complainant argued in his rebuttal brief that Respondents waived their right to make such a motion by not raising the issue of exhaustion of remedies at any time prior to the filing of their brief and by not including it in the stipulation of facts and issues. This argument is not without merit. There are also other reasons why the motion to dismiss should be denied.

Even if the motion in the instant case were timely, it would be denied. Section 204.54 states:

> "Any member of a labor organization whose rights under the provisions of § 204.2 are alleged to have been infringed or violated, may file a complaint in accordance with § 204.53: Provided, however, That such member may be required to exhaust reasonable hearing procedures (but not to exceed a 4-month lapse of time) within such organization."

This section is similar to section 101(a)(4) of the LMRDA which protects union members' right to sue ". . . Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organization or any officer thereof. . . ." The courts have held that the portion of section 101(a)(4) relating to exhaustion of remedies is permissive and not mandatory on the court or administrative agency before whom a member institutes an action. Complainant cites NLRB v. Marine and Shipbuilding Workers, 391 U.S. 418 (1968) and Detroy v. Guild of Variety Artists, 286 F. 2d 75 (2d Cir., 1961), among other cases, to support this position. The Supreme Court stated in NLRB v. Marine and Shipbuilding Workers:

> "We conclude that 'may be required' is not a grant of authority to unions more firmly to police their members but a statement of policy that the public tribunals whose aid is invoked may in their discretion stay their hands for four months, while the aggrieved person seeks relief within the union."

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In view of the foregoing, a complaint may be accepted even though the member has not spent four months attempting to exhaust his internal union remedies, particularly if the union's constitution and bylaws do not provide reasonable hearing procedures or if no useful purpose would be served by requiring a four-month exhaustion of remedies.

Respondents contend that Complainant had numerous avenues for an internal union appeal -- by protesting under Article XII of the AFGE constitution entitled "Offenses, Trials, Penalties, Appeals," by bringing the matter to the attention of the National Executive Council or National President, by proceeding under the grievance procedure in the AFGE-FNR agreement, or by appealing to the Convention. However, Article XII applies only to an appeal by a member who has been disciplined; a July 30, 1970, letter by Attorney Hostler to President Griner had informed him of FNR's opposition to his July 23, 1970, directive and no reply had been received; proceeding under the provisions of the AFGE-FNR agreement would be inappropriate in a matter that involved a union constitutional provision and rights claimed under the Executive Order; and, as Complainant pointed out, there are no specific provisions in the AFGE constitution for an appeal to the Convention. Under these circumstances it would therefore not have been reasonable to require the Complainant to make further efforts to obtain relief through appeals to his labor organization.

Section 204.55(b), the other section of the Regulations cited by Respondents in their motion for dismissal, states, in part, that "The complainant shall submit with his complaint a statement setting forth the procedures, if any, invoked to remedy the alleged violation . . . ." This provision does not require that internal procedures be invoked, but merely requires that any such internal remedies which have been invoked must be described in the complaint.

The motion to dismiss is hereby denied.

Analysis of the Issues

Five issues were included in the stipulation of facts and issues and each will be considered separately.

1. Does Article VI, Section 10 of the AFGE constitution violate section 204.2(a)(1) or section 204.2(a)(2) of the Regulations?

Article VI, Section 10 of the AFGE constitution states: "No person who is a paid employee of the Federation and not an elected officer shall be a delegate to any National Convention of the Federation." Section 204.2(a)(1) of the Regulations guarantees union members equal rights to nominate candidates, to vote in union elections, and to attend and participate in membership meetings. Section 204.2(a)(2) of the Regulations guarantees union members freedom of speech and assembly. The right to be a candidate for union office is not protected by either of these sections of the Regulations.

Section 204.1 of the Regulations specifically provides that in applying the Standards of Conduct the Assistant Secretary will be guided by decisions of the courts interpreting the LMRDA. The constitutional provision in question relates to eligibility for holding union office and the Supreme Court stated in Calhoon v. Harvey, 379 U.S. 134 (1964), that ". . . Title IV /of the LMRDA/, not Title I, sets standards for eligibility and qualifications of candidates and officials. . . ." Section 204.29 of the Regulations incorporates the election standards in Title IV of the LMRDA and sections 204.63 through 204.65 provide distinct procedures for challenging alleged violations of section 204.29. Article VII, Section 10 of the AFGE constitution provides that its principal officers are elected at its regular convention by the delegates. Therefore, Complainant's proper procedure for challenging the provision in the AFGE constitution forbidding paid employees from being delegates would have been to challenge the delegate election through a complaint under section 204.63 of the Regulations.

I find that Article VI, Section 10 of the AFGE constitution does not violate section 204.2(a)(1) or section 204.2(a)(2) of the Regulations.

2. Does Article VII, Section 8 of the AFGE constitution violate section 204.2(a)(1) or section 204.2(a)(2) of the Regulations?

Article VII, Section 8 of the AFGE constitution states: "No paid employee, as distinguished from an elected officer of the American Federation of Government Employees, may be a candidate for any elective office within the AFGE while remaining on the payroll of the AFGE. Any announcement as to candidacy or resignation of said employee, shall be made at least thirty days prior to the convening of any National Convention." This provision, like Article VI, Section 10, is primarily a requirement for candidacy and as such does not present an issue under section 204.2 of the Regulations.

I find that Article VII, Section 8 of the AFGE constitution does not violate section 204.2(a)(1) or section 204.2(a)(2) of the Regulations.

3. Does Article XIV, Section 2 of the collective bargaining agreement between the Federation of National Representatives, Local Union No. 1, and AFGE violate the rights enumerated in sections 204.2(a)(1) and 204.2(a)(2) of the Regulations?

Article XIV, Section 2 of the collective bargaining agreement states: "The National Representatives will not be in attendance at any caucus during the nomination of National Vice-President or at the National Convention during the nominations and election of National Officers."

The equal rights provisions of section 204.2(a)(1) which include the right to attend membership meetings are not involved in this clause in the agreement unless caucuses and conventions are considered to be membership meetings. It is not possible to conclude on the basis of the available information that they are membership meetings, since actual attendance, other than as spectators or visitors, and participation seem to be restricted to properly elected delegates and alternates.

Section 204.2(a)(2) of the Regulations, which grants union members freedom of speech and assembly, makes this freedom subject to the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution. The restriction in the agreement prohibiting National Representatives from being present at caucuses and conventions during the nomination and election of officers is a reasonable rule as to their responsibility toward the organization as an institution. Restricting National Representatives' participation in national union politics has the effect of eliminating a potential conflict of interest between the duty of a National Representative to the union and the use of his position as National Representative to advance the special interests of a particular candidate or a particular faction within the union.

I find therefore that Article XIV, Section 2 of the collective bargaining agreement between the Federation of National Representatives, Local Union No. 1, and AFGE does not violate section 204.2(a)(1) or section 204.2(a)(2) of the Regulations.

4. Did the directive under date of July 23, 1970, from John F. Griner, President of AFGE, violate section 204.2(a)(1) or section 204.2(a)(2) of the Regulations?

The directive stated that any employee found guilty of lobbying for or against any resolution coming before the National Convention could expect to have charges preferred against him, and any employee found guilty of campaigning for or against any candidate for National Office would be summarily dismissed from the Federation. The parties stipulated that the directive informed all employees that any participation in national politics at the Convention would result in disciplinary action against them. The parties also stipulated that the directive was a reiteration of the policy in the AFGE National Constitution and the established policy for the past several National Conventions.

The directive was the implementation of a rule which has the effect of keeping employee-members from becoming involved in national union politics to the detriment of the union as a whole. As indicated in the discussion of the provision in the collective bargaining agreement, there is a potential conflict of interest between the duty of a National Representative to the union and the use of his position as a National

Representative to advance the special interests of a particular candidate or a particular faction within the union. Therefore, the directive may be considered to fall within the provision in section 204.2(a)(2) that permits labor organizations to "adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution."

I, therefore, find that the directive of July 23, 1970, does not violate section 204.2(a)(1) or section 204.2(a)(2) of the Regulations.

5. Was the Complainant as an elected alternate delegate denied rights as enumerated by section 204.2(a)(1) and section 204.2(a)(2) of the Regulations when he was denied the right to attend and participate in the affairs of the Twenty-Second National Convention of AFGE held in August 1970?

Complainant's credentials as an alternate delegate were not accepted at the Convention because he had been chosen in violation of Article VI, Section 10 of the AFGE constitution which prohibits paid employees of the Federation from being delegates to National Conventions. Neither the right to be a delegate nor the right to participate in a convention "as a delegate" is protected by section 204.2(a)(1) or section 204.2(a)(2). Cf. Keene v. Ice Machinery Independent Employees Association, 331 F. Supp. 1355 (M.D. Pa. 1971).

I find that AFGE's refusal to permit Complainant to attend and participate in the affairs of the Twenty-Second National Convention as an alternate delegate was not a violation of section 204.2(a)(1) or section 204.2(a)(2) of the Regulations.

ORDER

IT IS HEREBY ORDERED that Case No. 50-4750 be, and it hereby is, dismissed.

Dated, Washington, D. C.
May 31, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

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

HEADQUARTERS & INSTALLATION
SUPPORT ACTIVITY (AVSCOM)
A/SLMR No. 165

The subject case involved a representation petition filed by the American Federation of Government Employees, AFL-CIO, Local 3095, (AFGE) for a unit of all nonsupervisory, nonappropriated fund (NAF) employees, including off-duty military personnel, at the AVSCOM Officer's Club located in the Mart Building in St. Louis, Missouri.

The St. Louis Army Officers' Open Mess is one of six NAF activities in the Headquarters and Installation Support Activity (AVSCOM). It was established on July 1, 1971, as a result of a consolidation of the AVSCOM Open Mess in St. Louis with the Granite City Army Depot Officers' Mess some six and one-half miles away in Illinois. The consolidated Open Mess operates facilities at the Mart Building and at another location in St.Louis, as well as a facility at the Granite City installation. In finding that the claimed unit was not appropriate, the Assistant Secretary noted that there were other employees of the consolidated Open Mess and of other NAF activities who performed essentially the same job functions as the petitioned for employees; all employees of the consolidated Open Mess share common personnel policies and benefits; all facilities of the consolidated Open Mess are centrally administered by the Custodian of the consolidated Open Mess who has full authority over its personnel; and there has been some degree of interchange between the various facilities of the consolidated Open Mess. The Assistant Secretary stated also that in his opinion such a fragmented unit would not promote effective dealings and efficiency of agency operations.

Accordingly, the Assistant Secretary ordered that the petition filed by AFGE be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

HEADQUARTERS & INSTALLATION
SUPPORT ACTIVITY (AVSCOM) 1/

Activity

and

Case No. 62-2722 (RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3095

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Orville G. Spelver. 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, American Federation of Government Employees, AFL-CIO, Local 3095, herein called AFGE, seeks an election in a unit of all nonappropriated fund (NAF) employees, including all off-duty military personnel, at the Officer's Club, AVSCOM, at the Mart Building, Twelfth and Spruce Streets, St. Louis, Missouri, excluding supervisors, management officials, guards, employees engaged in Federal personnel work other than in a purely clerical capacity and professional employees.

The Activity disputes the appropriateness of the claimed unit on the grounds that it constitutes only a portion of a larger organization, the St. Louis Army Area Officers' Open Mess. The Activity contends that the appropriate unit should encompass employees in all three officers' open mess facilities within the St. Louis metropolitan area or, in the alternative, a more comprehensive unit

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

embracing all of the NAF activities in the Headquarters & Installation Support Activity (AVSCOM), herein called HISA.

The St. Louis Army Officers' Open Mess is one of six NAF activities under the Housing, Morale and Welfare Division of HISA. Prior to July 1, 1971, the AVSCOM Officers' Open Mess operated as a separate NAF activity, but on that date it was consolidated with the Granite City Army Depot Officers' Open Mess and the St. Louis Army Officers' Open Mess was established. In St. Louis, Missouri, the newly consolidated Open Mess operates a bar and restaurant facility in the Mart Building in which are employed the employees in the petitioned for unit. It also operates, at another location in St. Louis, a bar facility for the U.S. Army Mobility Equipment Command (MECOM). At the Granite City installation in Illinois, which is some six and one-half miles away from the St. Louis facilities, the consolidated Open Mess operates a bar and restaurant and a retail package liquor store.

The consolidated Open Mess operates under a single Custodian, who is its overall manager and administrator. He divides his time among the two facilities in St. Louis and the Granite City installation. Each of the three locations is under a manager who has been delegated immediate supervisory authority over the employees and operations in his respective facility. However, the Custodian has full authority in the areas of hiring, firing, disciplining, training, promotions, and the settling of grievances. He also is responsible for purchasing supplies and accounting for funds and property belonging to the consolidated Open Mess.

The claimed unit consists of seventeen employees located at the Mart Building. The record reveals that all NAF employees, including those in the claimed unit, are categorized as either Category A, which includes clerical, administrative and professional employees, or as Category B, which includes craft employees and employees who perform manual labor. Employees in the claimed unit who are employed as cooks, bartenders, counter attendants, waitresses, porters, as well as an administrative assistant, are included in both categories. The record reflects that there are NAF employees performing similar duties at the other facilities operated by the consolidated Open Mess. Thus, at the Granite City installation there are cooks, porters, waitresses, bartenders, food service helpers, and counter attendants, while at MECOM there is a bartender. The record shows also that in the first few months after the consolidation, on at least two occasions, bartenders from the Mart Building and MECOM have been transferred temporarily to the Granite City installation. Moreover, there are other NAF activities under HISA which provide services similar to those provided by the Open Mess at the Mart Building. In this regard,

the evidence reveals that among the other NAF activities, there is a Non-Commissioned Officers' Club, employing eleven persons, which has a food service arrangement and a bar. Further, employees at the Mart Building share common benefits with other employees of the Open Mess and with other NAF activity employees, including retirement and insurance benefits, annual and sick leave policies, and a common grievance procedure.

Based on the foregoing, I find that the unit sought by the AFGE is not appropriate for the purpose of exclusive recognition under Executive Order 11491. Thus, as noted above, there are other employees of the consolidated Open Mess, and of other NAF activities within HISA, who perform essentially the same job functions as the employees in the petitioned for unit; all the employees of the consolidated Open Mess share common personnel policies and benefits; all facilities of the consolidated Open Mess are centrally administered by the Custodian who also has full authority over its personnel; and there has been some degree of interchange between the various facilities of the consolidated Open Mess. In these circumstances, I find that employees in the petitioned for unit do not share a clear and identifiable community of interest apart from other employees. Further, in my opinion, such a fragmented unit would not promote effective dealings and efficiency of agency operations. 2/

Accordingly, I shall order that the AFGE's petition be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 62-2722 (RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
June 23, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

2/ Cf. United States Army Special Services, Central Post Fund, Fort Benning, Georgia, A/SLMR No. 36; United States Air Force, Department of Defense, Non-Appropriated Fund Activities, 4756th Air Base Group, Tyndall Air Force Base, Florida, A/SLMR No. 124

June 23,1972

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

DEPARTMENT OF THE ARMY,
HEADQUARTERS, CAMP McCOY, WISCONSIN,
ST. LOUIS METROPOLITAN AREA,
ST. LOUIS, MISSOURI
A/SLMR No. 166

Pursuant to the Decision and Remand of the Assistant Secretary in A/SLMR No. 118, a subsequent hearing was held for the purpose of adducing additional evidence with respect to, among other things, the appropriateness of the unit sought by the American Federation of Government Employees, AFL-CIO, Local 3154 (AFGE). The AFGE sought a unit of all General Schedule (GS) Army reserve technicians serviced by the Civilian Personnel Office at Camp McCoy, Wisconsin, and working in the St. Louis metropolitan area. The claimed unit would include employees from four different Army Reserve Commands (ARCOMS). The Activity contended that the proposed unit was inappropriate and would not promote effective dealings and efficiency of agency operations inasmuch as it crossed Command lines and excluded Wage Board employees. The Activity further asserted that Staff Administrative Assistants included in the claimed unit were supervisors and should be excluded.

The Assistant Secretary found that the petitioned for employees did not have a clear and identifiable community of interest in that the petitioned for unit did not constitute a distinct and homogenous grouping of the Activity's employees. In this connection, he noted that the proposed unit was not an organizational entity but, rather, consisted of segments of four separate Commands, two or three of which were headquartered outside the St. Louis area; that the employees in the claimed unit constituted only some of those in each Command performing related functions; that each of the thirteen Commands reporting to the Commanding General, U.S. Fifth Army, operated under a different Commanding Officer and functioned independently from other Commands regardless of geographic location; and that all personnel activities for employees in the thirteen Commands, including those employees in the proposed unit, were centralized in the Civilian Personnel Officer, Camp McCoy, Wisconsin. Thus, neither functionally nor administratively did the claimed unit reflect that the employees sought shared a community of interest separate and distinct from other reserve technicians. The Assistant Secretary noted also that the proposed unit would artificially divide and fragment Commands serviced by the Civilian Personnel Office at Camp McCoy and could not reasonably be expected to promote effective dealings or efficiency of agency operations.

Accordingly, the Assistant Secretary dismissed the AFGE's petition.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,
HEADQUARTERS, CAMP McCOY, WISCONSIN,
ST. LOUIS METROPOLITAN AREA,
ST. LOUIS, MISSOURI

Activity

and

Case No. 62-2361 (RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3154

Petitioner

SUPPLEMENTAL DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held in the subject case. Thereafter, on December 21, 1971, I issued a Decision and Remand, 1/ in which I remanded the case to the appropriate Regional Administrator for the purpose of reopening the record in order to secure additional evidence concerning, among other things, the appropriateness of the unit sought. On February 9 and February 10, 1972, a further hearing was held before Hearing Officer Roger B. Schlueter. The Hearing Officer's rulings made at the reopened hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this matter, including the facts developed at both hearings, I find:

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

1/ A/SLMR No. 118

2. The Petitioner, American Federation of Government Employees, AFL-CIO, Local 3154, herein called AFGE, seeks an election in a unit of all General Schedule (GS) reserve technicians serviced by the Civilian Personnel Office, Camp McCoy, Wisconsin, and working in the St. Louis metropolitan area, excluding Wage Board (WB) employees, management officials, supervisors, professional employees, guards, and employees engaged in Federal personnel work in other than a purely clerical capacity. 2/

The Activity contends that the proposed unit is inappropriate because it crosses Command lines and excludes WB employees and, as a consequence, would not promote effective dealings and efficiency of agency operations. It asserts also that one category of technicians, Staff Administrative Assistants, are supervisors within the meaning of the Order and, therefore, should not be included in any unit found appropriate.

It now appears from the record that there are thirteen major Army Reserve Commands (ARCOMS) in a nine-state area, including St. Louis, Missouri, which report to the Commanding General, U.S. Fifth Army. 3/ Employees of four of the ARCOMS, located in the St. Louis metropolitan area, are included in the petitioned for unit. 4/ The record reveals that in addition to GS technicians, there are some WB employees in the ARCOMS in the St. Louis metropolitan area.

2/ The claimed unit appears as amended at the second hearing. The original petitioned for unit included specifically all Staff Administrative Assistants, Staff Administrative Specialists, Staff Training Assistants, Staff Supply Assistants and Administrative Supply Technicians serviced by the Civilian Personnel Office, Camp McCoy, Wisconsin, and working in the St. Louis metropolitan area. The amendment resulted in the apparent inclusion of an additional GS classification, that of the Equipment Specialist, in the claimed unit.

3/ In the initial hearing in this matter it appeared that there were twelve ARCOMS.

4/ However, these ARCOMS also have employees located outside the St. Louis metropolitan area.

Each of the ARCOMS, including those headquartered or located in part in the St. Louis metropolitan area, is commanded by a General Officer, who reports directly to the Commanding General, U.S. Fifth Army. Each Command functions independently from other Commands, and the Commanding General of one Command has no control over employees of another Command regardless of geographic location. The record reflects that the employees of each Command in the St. Louis metropolitan area have little contact with employees of the other Commands working in the same area. Further, there are technicians working for the ARCOMS involved herein who are outside the St. Louis metropolitan area and who have identical job titles and similar duties to technicians in the claimed unit.

The Civilian Personnel Office at Camp McCoy, which has been delegated responsibility for personnel administration by the Commanding General, U.S. Fifth Army, is the emanating source for most personnel actions in the thirteen ARCOMS. In this connection, opportunities for promotion in each Command are posted throughout the thirteen Commands; the final authority for hiring and adverse actions rests with the Civilian Personnel Office, Camp McCoy; and grievance and appeals procedures are uniform throughout the thirteen Commands. The Civilian Personnel Officer, Camp McCoy, is the principal point of contact for conducting labor-management relations throughout the area he services. Also, while the competitive areas for reductions-in-force are the commuting areas, retention registers are prepared by the Civilian Personnel Office. Moreover, records of employees' performance are maintained by the Civilian Personnel Office at Camp McCoy.

Based on the foregoing, I find that the petitioned for employees do not have a clear and identifiable community of interest. In this connection, the record is clear that the petitioned for unit does not constitute a distinct and homogenous grouping of the Activity's employees. Thus, the proposed unit is not an organizational entity but, rather, consists of segments of four separate Commands, two or three of which are headquartered outside the St. Louis area. The record further shows that the employees in the claimed unit are only some of those in each Command performing related functions. The evidence further establishes that each Command operates under a different Commanding Officer and functions independently from other Commands regardless of geographic location, and that all personnel activities for all the Commands in the designated nine-state area are centralized in the Civilian Personnel Officer, Camp McCoy, Wisconsin. Thus, neither functionally nor administratively does the claimed unit reflect that the employees therein share a community of interest separate and distinct from other reserve technicians. Moreover, in my view, the unit proposed by the AFGE, which would artificially

divide and fragment, on the basis of geographic location, the Commands serviced by the Civilian Personnel Office at Camp McCoy, could not reasonably be expected to promote effective dealings or efficiency of agency operations.

Accordingly, I shall dismiss the petition herein. 5/

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 62-2361(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
June 23, 1972

W.J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

5/ In view of the disposition herein, I find it unnecessary to decide whether Staff Administrative Assistants are supervisors within the meaning of the Order.

June 26, 1972

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

ARMY AND AIR FORCE EXCHANGE SERVICE ,
FORT HUACHUCA EXCHANGE SERVICE ,
FORT HUACHUCA, ARIZONA
A/SLMR No. 167

This case involved a representation petition filed by the American Federation of Government Employees, AFL-CIO, Local 1662, (AFGE) seeking a unit of all nonsupervisory part-time and full-time employees, employed by the Army and Air Force Exchange Service, Fort Huachuca, Arizona. The parties were in agreement as to the appropriateness of the unit petitioned for, but disagreed as to the eligibility status of "temporary" full-time, and "temporary" part-time employees. Thus, the AFGE would include, while the Activity would exclude, such employees.

The Assistant Secretary found that temporary full-time and temporary part-time employees should be excluded from the unit found appropriate. He noted that the record indicated that the "temporary" employees had no reasonable expectation of future employment as they were hired for specific periods only.

In all the circumstances, the Assistant Secretary also found that the claimed unit was appropriate and, accordingly, he directed that an election be held in that unit. He noted that the employees covered by the petition engaged in similar duties on an Activity-wide basis and were subject to the same general working conditions, salary schedule and benefits. Further, they had similar supervision, hours of work, grievance procedures and leave policies and vacancies and promotions were posted on an Activity-wide basis. In the Assistant Secretary's view, such a unit would promote effective dealings and efficiency of agency operations.

A/SLMR No. 167

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ARMY AND AIR FORCE EXCHANGE SERVICE,
FORT HUACHUCA EXCHANGE SERVICE,
FORT HUACHUCA, ARIZONA 1/

Activity

and

Case No. 72-RO-2913 (25)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 1662

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer William P. Ormes. 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, American Federation of Government Employees, AFL-CIO, Local 1662, herein called AFGE, seeks an election in a unit of all part-time and full-time employees employed by the Army and Air Force Exchange Service, Fort Huachuca, Arizona, excluding supervisors, management officials, guards, employees engaged in Federal personnel work in other than a purely clerical capacity, and casual and on-call employees who work less than 16 hours a week. The Activity contends that the unit petitioned for by the AFGE is not appropriate because it includes full-time and part-time "temporary" employees who do not share a community of interest with the employees in the claimed unit. 2/

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

2/ At the hearing, the AFGE expressed its willingness to exclude "temporaries" from the unit.

Unit Issue

The Activity, which is located physically at the Fort Huachuca reservation in Arizona, is an administrative subdivision of the Army and Air Force Exchange Service. To accomplish its mission of providing sales and services for the Fort, the Activity is divided into three administrative subdivisions; retail operations, food operations, and service operations. A General Manager is in overall charge of the three subdivisions. Reporting to the General Manager is an operation manager for each division. Under these three subdivisions are approximately 15 suboperations dealing in retail merchandising; food dispensing; and service related operations, such as gasoline dispensing and mechanical repairs on automobiles. In order to carry out its mission, the Activity operates a "Main Store," a "Main Cafeteria" and cafe, snack bars, and a service station. 3/ Among the employees in these facilities are retail sales clerks, cashiers, stock handlers, cooks, food service counter attendants, service station attendants and mechanics. They are classified in one of the following categories: regular full-time, regular part-time, temporary full-time, temporary part-time, casual and on-call.

With respect to the duties of the employees in the unit sought, the evidence reveals that the retail operation employees perform sales and other related functions; the food service operation employees perform functions necessary to the overall operation of the cafeteria and snack bar; and the service operation employees dispense gasoline and oil and perform minor vehicle repairs and tuneups. These employees are all subject to the same general working conditions, salary schedules, and benefits. Further, they have similar supervision, hours of work, grievance procedures, and leave policies, and vacancies and promotions are posted on an Activity-wide basis. In these circumstances, and noting the Activity-wide nature of the unit sought, I find that the employees covered by the AFGE's petition constitute an appropriate unit for the purpose of exclusive recognition as the evidence establishes that they share a clear and identifiable community of interest. I find, further, that such a unit will promote effective dealings and efficiency of agency operations.

Eligibility Issues

Temporary full-time employees generally are hired for a definite period of 90 days or less, but in unusual circumstances, they may work a specified period not to exceed 180 days. While they are employed, such employees have a regularly scheduled work week of 35 to 40 hours. Employees utilized for more than 90 or 180 days, as applicable, are

3/ There also are various concessions at the Activity. They are operated by an independent contractor whose employees work for the concessionaire rather than the Activity.

converted to regular full-time employee status. 4/ There are currently three temporary full-time employees at the Activity.

Temporary part-time employees are hired for an expected period of 90 days or less with a regularly scheduled workweek of at least 16 but not more than 35 hours. According to Agency regulations, employees utilized for more than 90 days will be converted to regular part-time status except for military personnel employed during off-duty hours. 5/ There are currently about four civilian employees in the temporary part-time category.

The evidence reveals that when employees in either of the above-noted "temporary" categories are employed, their expectancy is that their employment will terminate at the time specified. Such employees are utilized primarily for seasonal needs, especially during the Christmas period, or to fill in for employees having long-term illnesses or injuries. Some temporary employees are offered "regular" status if such jobs become available. As noted above, if the employee accepts, he is automatically converted to a "regular" classification. Further, if he remains on the payroll beyond his temporary term, it is required that he be converted to the appropriate "regular" classification.

In the circumstances, I find that neither temporary full-time nor temporary part-time employees of the Activity share a clear and identifiable community of interest with the employees in the petitioned for unit. Although the evidence establishes that the general conditions of work for all employees of the Activity employed by the Exchange are similar, it also indicates that the temporary employees are hired for a specific period and, generally, have no reasonable expectation of future employment beyond that period. Accordingly, I shall exclude "temporary" employees from the unit found appropriate. 6/ Moreover, I find that "casual employees", who are hired to fill non-skilled, non-recurring jobs and "on-call employees", who fill in during temporary absences of regular employees, do not have a reasonable expectancy of future employment. Accordingly, I shall exclude them from the unit found appropriate. See Alaskan Exchange System, Base Exchange, Fort Greely, Alaska, cited above.

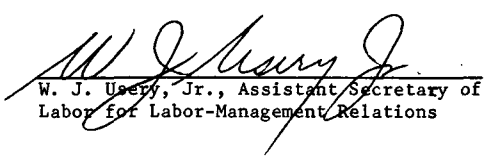
Based on the foregoing, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of Executive Order 11491:

> All regular full-time and regular part-time employees, including off-duty military personnel in either of the foregoing categories, 7/ employed at Fort Huachuca Exchange, Fort Huachuca, Arizona, excluding temporary full-time, temporary part-time, casual and on-call employees, employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, management officials, and supervisors and guards as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 45 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 those 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 1662.

Dated, Washington, D. C.
June 26, 1972



W. J. Usery, Jr., Assistant Secretary of
Labor for Labor-Management Relations

4/ Such status is defined as an employee hired for an expected period of more than 90 days with a regularly scheduled work week of 35 to 40 hours per week.

5/ Agency Regulation AR 60-21/AFR-147-15, dated August 27, 1970, provides that temporary part-time employees who work more than 90 days are converted to regular part-time, "except military personnel employed on off-duty hours." In this connection, see footnote 7 below.

6/ In Alaskan Exchange System, Base Exchange, Fort Greely, Alaska, A/SLMR No. 33, I did not pass upon the status of "temporary full-time" employees as the record in that case established that there were no "temporary full-time" employees employed at that facility. In the subject case, however, there are employees at the Activity employed in this category and, as noted above, I find that their exclusion from the appropriate unit is warranted.

7/ In my view, off-duty military personnel, who work a sufficient number of hours to be classified as either regular full-time or regular part-time may not be excluded from the unit on the basis of agency regulations which automatically categorize off-duty military personnel as "temporary part-time" employees regardless of the time they work or otherwise automatically exclude them from bargaining units.

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

HEADQUARTERS, UNITED STATES
ARMY AVIATION SYSTEMS COMMAND
A/SLMR No. 168

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 3095, AFL-CIO (AFGE) against Headquarters, United States Army Aviation Systems Command (AVSCOM) alleging a violation of Section 19(a)(6) of Executive Order 11491. The entire record in this case, which was submitted to the Assistant Secretary by stipulation pursuant to Section 205.5(a) of the Regulations, consisted of the parties' stipulation of facts and accompanying exhibits.

The facts giving rise to the filing of the complaint involved AVSCOM's refusal to sign a negotiated agreement which had been fully agreed upon previously by the parties.

The stipulation revealed that the AFGE was the certified representative of a unit of Wage Board employees of AVSCOM. Subsequent to certification, the parties entered into negotiations for an agreement. During the course of negotiations AVSCOM filed a petition for clarification of unit based on a reorganization. Final accord concerning the parties' negotiated agreement was reached on October 7, 1971. At that time, AVSCOM refused to sign the agreement pending a decision by the Assistant Secretary in the related unit clarification case.

In reaching a determination in this case, the Assistant Secretary noted that the primary objective of any negotiation is the reaching of an agreement between the parties, as evidenced by a signed agreement which serves as a clear indication of recognition of the labor organization and as a permanent record of its terms. Further, the Assistant Secretary found that while parties are not compelled to agree to proposals or make concessions, once agreement is reached the failure to sign constitutes a refusal to consult, confer, or negotiate in violation of Section 19(a)(6) of the Order. The Assistant Secretary noted that the certified unit herein remained viable and identifiable and that, therefore, the Respondent's refusal to sign a previously agreed upon negotiated agreement was not warranted.

Having found AVSCOM's refusal to sign the agreement to be in violation of Section 19(a)(6), the Assistant Secretary ordered AVSCOM to cease and desist from refusing to sign the agreement and to take certain affirmative action in order to effectuate the purposes and provisions of the Order.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

HEADQUARTERS, UNITED STATES ARMY
AVIATION SYSTEMS COMMAND

Respondent

and Case No. 62-2903(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3095, AFL-CIO

Complainant

DECISION AND ORDER

This matter is before the Assistant Secretary pursuant to Regional Administrator Cullen P. Keough's March 2, 1972 Order Transferring Case to the Assistant Secretary of Labor pursuant to Section 205.5(a) of the Rules and Regulations. Upon consideration of the entire record in the subject case, which includes the parties' stipulation of facts and accompanying exhibits, 1/ I find as follows:

On December 15, 1971, the American Federation of Government Employees, Local 3095, AFL-CIO, herein called Complainant, filed an unfair labor practice charge wherein it was contended that the Headquarters, United States Army Aviation Systems Command, herein called Respondent, had violated Section 19(a)(6) of Executive Order 11491 by refusing to sign a negotiated agreement, the terms of which previously had been agreed upon. Subsequently, the Respondent informed the Complainant on January 12, 1972, that a directive from Headquarters, U. S. Army Materiel Command specifically precluded the execution of the agreement pending a decision by the Assistant Secretary in a related unit clarification case (Case No. 62-2443(CU)).

On February 8, 1972, the complaint in the subject case was filed alleging that the Respondent violated Section 19(a)(6) of Executive Order 11491 based on the latter's refusal to sign the parties' completed negotiated agreement.

1/ The parties did not file briefs.

The stipulation reveals that the Complainant was certified on May 21, 1970, as the exclusive representative for a unit of Wage Board employees at Headquarters, United States Army Aviation Systems Command. At that time 52 employees were included in the exclusively recognized unit. Following the signing of a memorandum of understanding on October 16, 1970, relative to the procedures for the conduct of negotiations for an agreement, the parties entered into formal collective bargaining negotiations on May 20, 1971. Negotiations between the parties were completed on October 7, 1971, with all matters of concern being fully agreed upon.

During the period of negotiations, and in anticipation of a reorganization, the Respondent filed a petition for clarification of unit on June 4, 1971. The anticipated reorganization occurred on July 1, 1971, and resulted in the establishment of the Headquarters and Installation Support Activity (HISA), which encompassed certain personnel from the Respondent's certified unit as well as employees at the Granite City Army Depot. 2/ As noted above, upon completion of the parties' negotiations for a collective bargaining agreement on October 7, 1971, the Respondent advised the Complainant that direction from higher headquarters precluded it from signing the negotiated agreement pending a determination by the Assistant Secretary in the related unit clarification matter.

All of the facts presented above are derived from the parties' stipulation and accompanying exhibits.

In my view, the primary objective of negotiations is to reach an agreement between an agency or activity and its employees' exclusive representative covering the terms and conditions of employment of the unit employees. Generally, the final step of the negotiation process is evidenced by a signed agreement which serves both as a clear indication of recognition of the labor organization and as a permanent record of its terms. In my opinion, a party's refusal to sign an agreement, the terms of which have previously been acquiesced in by both sides, serves to frustrate the negotiation process. Thus, such conduct evidences a failure to give meaning to the negotiation process as well as a failure to provide an authentic record of the terms of an agreement which can be exhibited to unit employees.

While the Order requires parties in a collective bargaining relationship to meet at reasonable times and confer in good faith, it does not necessarily compel them to agree to proposals or make concessions. However, it does not follow that having gone through the negotiation process and having reached an agreement, a party can then refuse to sign such agreement. Thus, I consider that implicit in the obligation to meet and confer in good faith is an obligation to sign an agreement once its terms have been agreed upon.

It is clear from the record in the subject case that the parties had completed their negotiations and that no substantive issues remained unresolved as of October 7, 1971. In this connection, the parties were in complete accord with respect to the terms and conditions of employment to be included in their finalized agreement. However, notwithstanding the fact that full accord had been reached by the parties, the Respondent refused to sign any agreement embodying such terms and conditions of employment. By such action, I find that the Respondent failed to give force and effect to a previously reached agreement and, thereby, refused to consult, confer, or negotiate in violation of Section 19(a)(6) of the Order.

The Respondent's sole defense for its conduct in this matter is based on a doubt as to the scope of the certified unit raised by the reorganization, which doubt it believed would be resolved by the determination made in the related unit clarification case. Thus, the Respondent argues that no agreement could be executed until the Assistant Secretary had made a determination as to which employees should be included within the certified unit.

From the evidence presented, I find that at all relevant times herein, the certified employee bargaining unit remained viable and identifiable. In such circumstances, the Complainant was entitled to continued recognition. 3/ Accordingly, I conclude that the Respondent's refusal to sign a previously agreed upon negotiated agreement was not warranted.

2/ Certain of the Granite City Army Depot employees organizationally reassigned to HISA were represented by Local 149B, International Union of Operating Engineers, AFL-CIO (IUOE). In the above-noted clarification of unit proceeding the Respondent contended that as a result of the reorganization a single bargaining unit of all Wage Board employees at HISA was appropriate. It requested, therefore, that an election be ordered to determine whether the Complainant, or the IUOE, represented the employees in the allegedly new, single, appropriate bargaining unit. In my recent decision in Headquarters, U. S. Army Aviation Systems Command, St. Louis, Missouri, A/SLMR No. 160, it was determined, contrary to the Respondent's position, that those employees represented by the Complainant in its certified unit and those represented exclusively by the IUOE in its established unit continued to be represented by those organizations in such units following the reorganization and the organizational reassignment to HISA as there was insufficient evidence that such units were no longer appropriate. Accordingly, the petition in that case was dismissed.

3/ Cf. United States Department of Defense, Department of the Navy Air Reserve Training Unit, Memphis, Tennessee, A/SLMR No. 106. It was noted also that the Respondent expressed no doubt as to the Complainant's continuing majority status following the reorganization.

CONCLUSION

By refusing to sign a negotiated collective bargaining agreement, which had previously been agreed upon on October 7, 1971, the Respondent violated Section 19(a)(6) of Executive Order 11491.

THE REMEDY

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

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 Headquarters, United States Army Aviation Systems Command shall:

1. Cease and desist from:

   (a) Refusing to sign the negotiated collective bargaining agreement agreed to on October 7, 1971, with the American Federation of Government Employees, Local 3095, AFL-CIO.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Order:

   (a) Upon request, sign the collective bargaining agreement negotiated and agreed to on October 7, 1971, with American Federation of Government Employees, Local 3095, AFL-CIO.

   (b) Post at its facility copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the 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.

   (c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within ten (10) days from the date of this Order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
June 27, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to sign the negotiated collective bargaining agreement agreed to on October 7, 1971, with the American Federation of Government Employees, Local 3095, AFL-CIO.

WE WILL, upon request, sign the negotiated collective bargaining agreement which was previously agreed to on October 7, 1971, with the American Federation of Government Employees, Local 3095, AFL-CIO.

_____

_____
(Agency or Activity)

Dated _____ By _____
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrator of the Labor-Management Services Administration, United States Department of Labor, whose address is: 2511 Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

June 26, 1972

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

DEPARTMENT OF THE TREASURY,
BUREAU OF CUSTOMS,
BOSTON, MASSACHUSETTS
A/SLMR No. 169

This case arose as a result of the American Federation of Government Employees, Customs Council, Region I, AFL-CIO (AFGE) filing objections alleging that certain conduct by the Activity affected the results of an election held at the Department of the Treasury, Bureau of Customs, Boston, Massachusetts, which election also involved the National Customs Service Association (NCSA).

A hearing was held before a Hearing Examiner involving a procedural issue regarding the timeliness of the objections and involving also objections relating to the Activity's refusal to provide the AFGE with the use of its intra-office mail facilities and its refusal to permit non-employee organizers access to its premises.

Upon review of the Hearing Examiner's Report and Recommendations, the Assistant Secretary found, in agreement with the Hearing Examiner, that although the AFGE refused to accept service of the tally of ballots at the conclusion of the election, inasmuch as the Area Administrator furnished the tally of ballots to the AFGE by mail, the period for the filing of objections commenced at the time the tally was furnished. Accordingly, the objections herein were considered to have been timely filed. The Assistant Secretary noted, however, that he did not condone the practice by any party of deliberately refusing to accept service of the tally of ballots so as to gain additional time in which to file objections. He stated that, in the future, failure to accept such service of the tally will not operate to extend the period for filing objections.

With regard to the objections, the Assistant Secretary adopted the Hearing Examiner's recommendations and sustained the AFGE's objection relating to the Activity's refusal to permit the Union use of its intra-office mail facilities, inasmuch as the unit, composed of over 800 employees, is dispersed over a wide geographic area with some employees located in remote areas, and the Activity refused both the AFGE and the NCSA permission to use any of its facilities to enable them to communicate with employees in the unit. In these circumstances, and noting the desirability of attaining an informed electorate in elections held under the provisions of the Executive Order, the Assistant Secretary concluded that the Activity's refusal to make its internal mail services available improperly interfered with the conduct of the election. The Assistant Secretary also noted that existing agency policy to the contrary was not controlling.

The Assistant Secretary also adopted the Hearing Examiner's recommendation that the AFGE failed to sustain its prescribed burden of proof under Section 202.20(d) of the Regulations with respect to its objection concerning the alleged right of non-employees to gain personal access to employees on the Activity premises. In this connection, he noted that to sustain its burden of proof in this regard it would have to be shown that the employees at whom the campaigning was directed were inaccessible, thus rendering reasonable attempts to communicate with them on a direct basis outside the Activity's premises ineffective.

In these circumstances, the Assistant Secretary set aside the election and directed that a second election be conducted.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
BUREAU OF CUSTOMS,
BOSTON, MASSACHUSETTS

Activity

and

Case No. 31-3306(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, CUSTOMS COUNCIL,
REGION I, AFL-CIO

Petitioner

and

NATIONAL CUSTOMS SERVICE ASSOCIATION

Intervenor

DECISION ON OBJECTIONS
AND
DIRECTION OF SECOND ELECTION

On January 21, 1972, Hearing Examiner Henry L. Segal issued his Report and Recommendations in the above-entitled proceeding finding that the Activity had improperly denied use of its intra-office mailing facilities to the American Federation of Government Employees, Customs Council, Region I, AFL-CIO, herein called AFGE, and, therefore, interfered with the conduct of the election. Accordingly, he recommended that the election held on October 16, 1970, be set aside and a new election be directed.

The Assistant Secretary has reviewed the rulings of the Hearing Examiner made at the hearing and finds that no prejudicial error was

committed. The rulings are hereby affirmed. 1/ Upon consideration of the Hearing Examiner's Report and Recommendations and the entire record, including requests for review of the Hearing Examiner's Report and Recommendations filed by the Activity and the NCSA, I hereby adopt the findings and recommendations of the Hearing Examiner, except as modified herein.

With regard to the timeliness of the filing of the objections, the evidence disclosed that upon learning the results of the election on October 16, 1970, representatives of the AFGE walked out of the ballot count area, refusing either to sign the tally of ballots, or to accept service thereof. Thereafter, on October 19, 1970, the Area Administrator furnished the tally of ballots by mail to representatives of the AFGE. The latter subsequently filed objections to the election which were received in the LMSA Area Office on October 26, 1970.

In all the circumstances, I agree with the Hearing Examiner's finding that the five day period provided for in Section 202.20(a) of the Assistant Secretary's Regulations is computed based on the actual rather than the constructive furnishing of the tally of ballots to the parties. 2/ Accordingly, I find that the objections herein were filed timely from the date of actual service of the tally. However, in accordance with the Hearing Examiner, it should be noted that I do not condone the practice of refusing to accept service of the tally of ballots for the purpose of gaining additional time in which to file objections. Thus, it is expected that all parties will abide by the procedures established for the conduct of elections and, if present at the counting of ballots, will accept service of the tally of ballots at the conclusion of the election. In the future, failure to accept such service of the tally will not operate to extend the period for filing objections pursuant to Section 202.20(a).

The Activity and the NCSA took exception to the Hearing Examiner's finding that a letter dated December 2, 1970, submitted by the AFGE concerning the right of access of non-employee organizers to the Activity's property was merely a particularization of its earlier timely filed objections. In agreement with the Hearing Examiner, I find that the evidence established that the AFGE's letter of December 2, 1970, did not raise new objections but, instead, expanded upon its earlier timely filed objections of October 26, 1970. 3/

The objections filed by the AFGE in this case involved questions relating to the obligation of the Activity to provide the Union with the use of its intra-office mail facilities, and to grant non-employee organizers access to its premises.

With respect to the use of the mailing facilities, the Hearing Examiner found that the failure of the Activity to provide mailing services to the AFGE effectively precluded the dissemination of information to the electorate and thereby interfered with the results of the election. 4/

As set forth in the Hearing Examiner's Report and Recommendations, the unit involved herein is composed of over 800 employees located at approximately 50 different ports of duty spread out over several northeastern states. Some ports of duty have very few employees while others have many employees. During the pre-election campaign period, the Activity, relying on Department of the Treasury and Bureau of Customs manuals, denied both the AFGE and the NCSA the use of any of its facilities, including the use of its intra-office mail facilities. 5/ Further, the evidence revealed that in addition to denying use of the intra-office mailing privileges, the Activity also refused to permit the AFGE to use its bulletin boards, to post any notices to employees of the AFGE meetings to be held off its premises and to set up campaign tables in hallways.

1/ During the hearing, the National Customs Service Association, herein called the NCSA, made a motion to dismiss in which the Activity joined, on the ground that the objections in this case were untimely filed. In view of my finding herein on the question of timeliness discussed below, I adopt the recommendation of the Hearing Examiner to overrule the NCSA's motion to dismiss.

2/ It was noted that Section 202.19 of the Assistant Secretary's Regulations does not specify the method to be used for furnishing the tally of ballots to the parties. This Section provides merely that "Upon the conclusion of the election, the Area Administrator shall cause to be furnished to the parties a tally of ballots."

3/ In this connection, it should be noted that to avoid similar problems from arising in the future, it is expected that in its initial submission, the objecting party will state specifically the conduct that is being objected to, together with a statement of the reasons therefor.

4/ In reaching this conclusion, the Hearing Examiner noted that the Activity would have to provide the same mailing services to the NCSA.

5/ The AFGE attempted to mail campaign literature to employees at their ports of duty on September 19, 1970, but the Activity intercepted the mail and returned it to the AFGE.

In conducting elections under the Executive Order, it is of the utmost importance that the electorate be informed fully of all relevant information so as to enable employees to make a reasoned choice. The means of communicating with the electorate may take many forms, such as mailings, bulletin boards, handing out leaflets, etc. Where, as here, the employees of an Activity are dispersed over a wide geographical area, with some located in remote areas, and where employee addresses have not been furnished and access to employee bulletin boards has not been permitted, I find that an Activity has an affirmative obligation to provide some means whereby the electorate may receive necessary information in order to make an intelligent, informed choice. Such obligation may include, where necessary, making available to the labor organization or labor organizations involved the Activity's internal mailing services. It is recognized that the utilization of such mailing services may involve certain cost factors to the Activity. Nevertheless, weighing this factor against the overwhelming importance of attaining an informed electorate, it is my view that the costs incurred would be justified in the circumstances described above. 6/ Accordingly, I find that, in the circumstances of this case, the Activity's denial of the use of its mailing services as a means of communicating with the electorate constituted interference with the employees' free choice in the election and requires that the election be set aside and a second election directed. 7/ In this regard, the existence of Department of the Treasury and Bureau of Customs policy against the use of intra-office mail facilities was not controlling. See Charleston Naval Shipyard, A/SLMR No. 1.

With respect to the AFGE's objection relating to the denial of access by non-employees to Activity premises, the Hearing Examiner found that the AFGE failed to sustain its burden of proof to support this objection as required under Section 202.20(d) of the Assistant Secretary's Regulations. In this regard, he noted that the AFGE had not met its burden of proof that the only reasonable means of communication with the employees (on a personal basis) was by visitation on the Activity's premises.

6/ I agree with the Hearing Examiner's statement that the utilization of Activity mailing services must be applied with reason. I agree also that parties to the election must be treated equally. Cf. U. S. Department of the Interior, Pacific Coast Region, Geological Survey Center, Menlo Park, California, A/SLMR No. 143.

7/ As the matter was not raised by the objections herein, it was considered unnecessary to decide whether and in what circumstances an activity would be required to furnish to a labor organization home addresses of employees.

The evidence disclosed that the Activity denied requests by the AFGE for desk-drop privileges and refused to permit non-employee Union representatives to speak to employees at their work locations during nonwork time. However, the AFGE was granted permission by the General Services Administration to enter Federal property at both the John F. Kennedy Building and the U. S. Customs House in Boston for the purpose of distributing literature. As to the possibility of distribution of Union material at other more remote Activity facilities, the Hearing Examiner found that the AFGE failed to establish that it could not distribute literature to employees outside their work locations. Moreover, he found as to certain facilities that there were no nonworking areas on the premises.

I agree with the Hearing Examiner's conclusion that the AFGE has not met the prescribed burden of proof with respect to this objection. In my view, to support a contention that non-employee organizers should be accorded personal access (as distinguished from access through the mail) to employees on Activity premises for the purpose of campaigning, it must be shown that the employees at whom the campaigning is directed are inaccessible, thus rendering reasonable attempts to communicate with them on a direct basis outside the Activity's premises ineffective. As noted above, the Hearing Examiner found, and the evidence established, that the AFGE failed to demonstrate that it could not communicate directly with the Activity's employees at locations off the Activity's premises. In the absence of such evidence, I find, in agreement with the Hearing Examiner, that the AFGE's objections relating to the denial by the Activity of access to its premises by non-employee organizers to conduct an election campaign should be overruled.

Based on the foregoing, the election conducted on October 16, 1970, is hereby set aside and a second election will be conducted as directed below.

DIRECTION OF SECOND ELECTION

IT IS HEREBY DIRECTED that a second election be conducted as early as possible, but not later than 45 days from the date below, in the unit set forth in the Election Agreement dated September 16, 1970. The appropriate Area Administrator shall suprevise the election subject to the Assistant Secretary's regulations. Eligible to vote are those in the unit who are employed during the payroll period immediately preceding the date below, including employees who did not work during the period because they

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were ill, 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 have not been rehired or reinstated before the election date.

Dated, Washington, D. C.
June 26, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

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

DEPARTMENT OF THE TREASURY,
BUREAU OF CUSTOMS,
BOSTON, MASSACHUSETTS

Activity

and

CASE NO, 31-3306 (RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, CUSTOMS COUNCIL, REGION I,
AFL-CIO

Petitioner

and

NATIONAL CUSTOMS SERVICE ASSOCIATION

Intervenor

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Before: Henry L. Segal, Hearing Examiner

REPORT AND RECOMMENDATIONS
ON OBJECTIONS TO ELECTION

Statement of the Case

This proceeding was heard under Executive Order 11491 (herein called the Order) at Boston, Massachusetts, on October 13, 14 and 15, 1971, in accordance with a Notice of Hearing on Objections and an Order Rescheduling Hearing issued on August 20, 1971 and September 3, 1971, respectively, by the Acting Regional Administrator and Regional Administrator, respectively, of the United States Department of Labor, Labor-Management Services Administration, New York Region, pursuant to Section 202.20(d) of the Regulations of the Assistant Secretary for Labor-Management Relations (herein called the Assistant Secretary).

The issues heard concern certain objections filed by the Petitioner to conduct affecting the results of a mail ballot election in which the count of ballots took place on October 16, 1970, and in which the Intervenor received a majority of the votes cast. All parties were represented at the hearing by counsel, who were given full opportunity to adduce evidence, examine and cross-examine witnesses, submit arguments and file briefs.

Upon the entire record in this matter, from observation of the witnesses, and after due consideration of the briefs filed by the parties on December 23, 1971, the Hearing Examiner makes the following:

Findings and Conclusions

I. Petitioner's Objections to Conduct Affecting the Results of the Election

A. The Election

Pursuant to an Agreement for Consent or Directed Election, approved by the appropriate Area Administrator of the Labor-Management Services Administration on September 17, 1970, a mail ballot

election [1] was conducted in accordance with the provisions of the Order in the following unit of the Activity's employees:

"All employees of Region I of the Bureau of Customs except exclusion as noted below:

EXCLUDED: All supervisory and managerial employees, personnel employees who are performing functions other than purely clerical, and guards. Also excluded are all employees serving under excepted appointments."

The results of the election were as follows:

Approximate number of eligible voters	822
Void ballots	3
Votes cast for National Customs Association	356
Votes cast for American Federation of Government Employees	230
Votes cast against Exclusive Recognition	20
Valid votes counted	606
Challenged ballots	16
Valid votes counted plus challenged ballots	622

Challenges were not sufficient in number to affect the results of the election, and a majority of the valid votes counted plus challenges were cast for National Customs Service Association (the Intervenor).

1/ The Agreement provided, inter alia, that the Agency or Activity mail to each eligible employee an official ballot, necessary instructions and envelopes on October 1, 1970; that the ballots be returned so as to be received on or before October 16, 1970, at the post office box obtained by the Agency or Activity; that the count be held at 5:30 P.M., October 16, 1970.

B. The Objections Noted for Hearing

Objections to conduct affecting the results of the election were filed by the Petitioner on October 26, 1970, and in a letter dated December 2, 1970, the Petitioner elaborated on its objections in more detail.

The Regional Administrator issued his Report and Findings on Objections on April 2, 1971, in which he found merit to certain of the objections on a collective basis and others on an individual basis. He advised the parties in his Report that the election held on October 16, 1970, was to be set aside and that a rerun election would be conducted. 2/

Based on the Petitioner's objections filed on October 23, 1970, and its letter dated December 3, 1970, the Regional Administrator phrased the objections which he found collectively to be meritorious as follows:

Objection #1: "The Activity prevented the AFGE from mailing electioneering material to employees at their work locations."

Objection #2: "The AFGE representatives were denied the right to talk to Customs employees at various work locations during their coffee breaks and lunch hours."

Objection #3: "The AFGE was denied the use of bulletin boards for posting the notices of meetings."

Objection #4: "Locations were not available for campaigning before and after work outside of Customs installations because many contiguous areas were owned by private corporations." 3/

2/ Certain other objections were found by him to be non-meritorious.

3/ As noted, although the Regional Administrator found that these four objections collectively had merit, he found that only objections #1 and #2 individually had merit.

Pursuant to Section 202.20(f) of the Regulations, the Activity and the Intervenor filed separate requests for review of the Regional Administrator's Report accompanied by supporting statements. In his letter to the Activity and Intervenor dated July 30, 1971, the Assistant Secretary directed the Regional Administrator to issue a notice of hearing in this proceeding. He stated with respect to the issues to be heard:

> "Section 202.19 of the Regulations provides that 'Upon the conclusion of the election, the Area Administrator shall cause to be furnished to the parties a tally of ballots.' Section 202.20(a) of the Regulations provides a five day period for the filing of objections to an election. The investigative file in this matter raises a question as to when a tally of ballots was furnished to the parties."
>
> "In addition to the procedural issues which goes to timeliness of the objections, the requests for review raise major policy issues under Executive Order 11491 including the right of non-employee organizers to conduct an election campaign on the Activity's premises and the Activity's duty to provide mailing services to employees at their duty stations. It is concluded that these questions can best be resolved on the basis of record testimony."

In view of the Assistant Secretary's direction, the issues raised in this proceeding will be discussed under three principal subjects: (1) Timeliness of the Objections; (2) Activity's duty to provide mailing service to employees at their duty stations; and (3) The right of non-employee organizers to conduct an election campaign on the Activity's premises.

Preliminarily to a discussion of the issues it is material to describe briefly the Activity's area of operations.

Region I of the Bureau of Customs is comprised of the States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island and some 35 counties in the State of New York. The distribution (in approximate numbers) among the districts of Region I of the employees eligible to vote in the election is as follows:

Regional Headquarters (Boston, Mass.) ----------	45
Portland District (Hq., Portland, Maine) ---------	92
St. Albans District (Hq., St. Albans, Vermont)----	101
Boston District (Hq., Boston, Mass.) ------------	226
Providence District (Hq., Providence, R.I.) ------	14
Bridgeport District (Hq., Bridgeport, Conn.)------	21
Ogdensburg District (Hq., Ogdensburg, N. Y.)------	132
Buffalo District (Hq., Buffalo, N. Y.) ----------	223

All of the eligible employees are not located in the cities in which the districts are headquartered, and they may be found in varying numbers in some 50 locations scattered throughout the seven states in which Region I operates.

(1) Timeliness of Objections

The basic requirement of the Assistant Secretary's Regulations is that objections must be filed with the Area Administrator within five (5) days after the tally of ballots has been furnished. (Sec. 202.20(a).) The timeliness of the objections is dependent upon when the tally is considered to have been furnished.

The count of the ballots in the election was made on October 16, 1970. The ballots were picked up at the post office at approximately 4:00 P.M., and the count started at approximately 5:00 P.M. Since a mail ballot was involved, considerable time was consumed in checking eligibility lists against the returned ballots, and the count was not completed until late in the evening. In addition to the representative of the Area Administrator who conducted the count, there were representatives and observers of the Activity, the Petitioner and the Intervenor present at the count. Among those present for the Petitioner were Mrs. Margaret Burke, President of the AFGE's Customs Council, Region I; Daniel J. Kearney, National Vice President, AFGE, New England Region; Pat Conte, National Representative, AFGE; and G. Colleti, Representative, AFGE. Upon completion of the count at approximately 9:30 P.M., the results were announced by the Area Administrator's representative. He prepared the tally of ballots, and obtained signatures on the tally from representatives of the Activity and Intervenor. He then asked Mrs. Burke to sign the tally which she refused to do. At this point the AFGE delegation left the premises. According to Mrs. Burke and

Kearney, the refusal to sign was bottomed on the belief that there were irregularities in the election and that signing the tally would somehow prejudice the Petitioner's rights. According to Kearney, he advised the Area Administrator's representative that the Petitioner group was leaving because the Petitioner's people had had a long day and some would have a long ride home. There was no tender of a copy of the tally by the Area Administrator's representative to any Petitioner representative before the group left.

By letter dated October 19, 1970 addressed to Mrs. Marguerite F. Burke at her home and mailed by certified mail, the Acting Area Administrator enclosed a copy of the tally of ballots bearing the signatures of the Area Administrator's representative and those of representatives of the Activity and the Intervenor. The text of the Acting Area Administrator's letter follows:

> "Enclosed is a report of the tally of ballots as counted on Friday, October 16, 1970. Customarily each interested party receives a copy of this tally at the conclusion of the count, pursuant to the provisions of Section 202.19 of the Rules and Regulations issued with respect to the implementation of Executive Order 11491.
>
> "It is my understanding that the observers for AFGE in referenced election departed before the representative from my staff could complete the tally on Form LMSA 1107. It is also my understanding that the official observers for AFGE declined to sign the Certification on Conduct of Election, Form LMSA 1109 indicating that the balloting was fairly conducted, that all eligible voters were given an opportunity to vote their ballot in secret, and that the ballot box was protected in the interest of a fair and secret vote. Objections to the signing of the Certification on Conduct of Election should be expressed in separate signed statements, containing reasons."

According to Mrs. Burke, she works during the day and there was no one at her home to receive the letter. She did find a notice in her mail box from the post office that the letter was at the post office, but she was unable to pick it up until October 27, 1970. By letter dated October 28, 1970, she returned the enclosed tally with her signature to the Acting Area Administrator.

The Acting Area Administrator also mailed to Kearney a copy (with another copy of the tally enclosed) of his October 19, 1970 letter to Mrs. Burke, which was received by Kearney at his office on October 20, 1970. Kearney then prepared the Petitioner's objections dated October 23, 1970 and mailed them to the Area Administrator, who received them on October 26, 1970.

Thus, if it is considered that the tally was constructively furnished on October 16, 1970 the objections would be untimely filed, since under the Assistant Secretary's Regulations they would have had to be received by October 23, 1970. If it is considered that the furnishing of the tally was accomplished by mail, the objections, received by the Area Administrator on October 26, 1970, were timely filed.

In connection with the issue of timeliness of filing, the Activity and Intervenor raised a supplementary procedural problem not noted by the Assistant Secretary in his letter of July 30, 1971, directing this matter to hearing. The Activity and Intervenor contend that if the Petitioner's objections filed on October 26, 1970 are considered to be timely, these objections go only to the failure of the Activity to grant mailing privileges; that the December 2, 1970 letter of the Petitioner expanding on the objections raised the issue for the first time of the right of access of non-employee organizers to the Activity's property, and this latter issue clearly was untimely filed. The Activity depends on a decision of the Assistant Secretary pursuant to Section 6 of Executive Order 11491, Assistant Secretary's Report No. 22, January 15, 1971, where the Assistant Secretary decided that, "allegations of conduct affecting the results of an election contained in a request for review and not contained previously in the objections filed pursuant to Section 202.20(a) are untimely and will not be considered by the Assistant Secretary." Of course, in this case, right of access was not raised for the first time in a request for review, and I view the Petitioner's letter of December 2, 1970 as merely a particularization of the October 26, 1970 objections. Thus, mailing privileges specified in the October 26th filing is in itself a form of access

to the Activity's property. Further, the October 26th filing contains a general allegation that supervisory officials were allowed to interfere in the conduct of the election. The letter of December 2, 1970, insofar as it alleges a denial of access to the Activity's property, is also a particularization of the broad allegation that supervisory officials were allowed to interfere in the conduct of the election. Moreover, the Assistant Secretary specifically directed to hearing the issue of right of access to the Activity's property of non-employee organizers, and even if I considered the specification of right of access in the December 2, 1970 letter an additional allegation untimely filed (which I do not), I would be obliged to consider the issue under the Assistant Secretary's directive to me. I conclude that if the filing of the objections on October 26, 1970 is timely, the issue of right of access of non-employee organizers to the Activity's property is also timely.

Because the issue of timeliness of the filing of the objections is a procedural hurdle which must be resolved before any discussion of the substantive issues, I will set forth my conclusions as to timeliness at this point.

Conclusions as to Timeliness of Filing of Objections

The Activity and Intervenor argue that there was a form of constructive furnishing of the tally on October 16, 1970, immediately after the count, because the results were known to the Petitioner and Petitioner refused to sign the tally. In addition to the language in Section 202.20(a) of the Assistant Secretary's Regulations, the Activity points also to a condition of the election expressly stated in the Agreement for Consent or Directed Election,

> "5. TALLY OF BALLOTS - As soon after the election as feasible, the votes shall be counted and tabulated by the observers. Upon the conclusion of the counting, the Area Administrator shall cause to be furnished a Tally of Ballots to each of the parties . . ."

I do not interpret this provision to mean that the only time in which the Area Administrator may furnish a tally is immediately after the

count or that the tally is automatically furnished when the Area Administrator's representative completes preparation of the tally in the presence of representatives of the objecting party. There is no requirement that a Party must sign the tally, although I do not condone the refusal of a party taking advantage of the election procedure furnished by the Order to sign the tally.

I interpret Section 202.20(a) with respect to the furnishing of the tally to mean the actual furnishing of the tally, not constructive furnishing. In a similar case arising in the private sector, 4/ the Employer refused to accept the tally at the end of the count. The Regional Director of the National Labor Relations Board mailed the tally to the Employer, and the Board held that the objection period ran from the date the tally was received in the mail by the Employer. The rules and regulations of the National Labor Relations Board with respect to Timeliness of Objections (Section 102.61 of the Board's Rules and Regulations at the time of the Board Decision, now Section 102.69 of the Board's Rules and Regulations) are substantially similar to Section 202.20(a) of the Assistant Secretary's Regulations. The Board stated: "This rule does not specify in what manner a tally of ballots may be furnished to the parties. However, we deem the term furnish to embrace mailing. Moreover, as the Board Agent, for whatever reason, elected to mail the tallies to the Employer's attorney, we deem the date of receipt of such tallies controlling in computing the time for filing objections. In this view, it is immaterial whether or not a tender was made on November 3 [the date of the count], by the Board agent, and we do not pass upon that question." 5/

In the present case, the Acting Area Administrator chose to furnish the tally to the Petitioner by mail. Accordingly, I conclude that the objections, filed on October 26, 1970, were timely filed, as they were filed within five working days after receipt of the tally by mail, and will recommend to the Assistant Secretary that he deny the motions made at the hearing to overrule the objections on procedural grounds.

4/ The Secretary will take into account experience gained in the private sector. Charleston Naval Shipyard, A/SLMR No. 1.

5/ The Jacksonville Journal Company, 117 NLRB 360.

(2) Activity's Duty to Provide Mailing Service to Employees at their Duty Station

During the month of September 1970, there were meetings held between the Activity, Intervenor, and Petitioner to discuss the terms of an election. At one held on September 16, 1970, a representative of the Area Administrator was present and the Agreement for the election was executed.

There is some dispute in the record as to the number of meetings held in September and at which meetings certain matters were discussed. However, it is clear that, among other things, Pat Conte, National Representative for the Petitioner, asked for privileges to mail material to employees at their work locations, for bulletin board rights, for permission to representatives to speak to employees at their work-sites on non-work time such as coffee breaks or lunch time, for rights to leave material on employees' desks, and for the Activity to furnish campaign tables at certain locations. It is also clear that the Activity's representative, Regional Personnel Officer William J. Lawless, attempted to arrange some accommodation to both labor organizations in response to Petitioner's request. In fact Lawless proposed in writing that the Activity would permit mailing to certain work locations under certain conditions, use of bulletin boards under certain conditions, and the placing of literature on employees' desks under certain conditions. This proposal was never signed by the parties, and ultimately Lawless was overruled by his superiors on the ground that such activity by unions would be contrary to regulations set forth in the Treasury and Customs Personnel Manual. Thus, the Petitioner's request for rights to mail to work locations and other modes of access were denied by the Activity. 6/

6/ The Petitioner contends that the Activity reneged from its agreement to permit limited mailing to employees at work sites and other means of access. However, whether or not there was an actual side agreement is immaterial inasmuch as the Assistant Secretary has held that side agreements are not binding on him. See Report on a Decision of the Assistant Secretary Pursuant to Section 6 of Executive Order 11491, Report Number 20, December 8, 1970.

The Activity did furnish to both the Petitioner and Intervenor lists of eligible employees showing their ports of duty. (Home addresses were not furnished.)

On September 19, 1970, the Petitioner mailed campaign literature to all employees in the unit at their ports of duty. (Approximately 800 in the Unit.) However, the Activity did not deliver the material to the addressees and returned it to Petitioner. Subsequently, Petitioner mailed some of the same material to employee members of the Petitioner for whom it had addresses. (Numbering approximately 180.) 7/ Also, some of the returned envelopes containing the election material found their way to desks of employees, with a mimeographed note stapled to the envelope which stated:

> "Dear Fellow Employee: We are indeed sorry this First Class mail was not delivered to you as we had anticipated it would be. I am sure by now that Management and NCSA intend to make our role a difficult one. I sincerely hope you will read the message inside and realize that AFGE is your union."

Insofar as mailings were made to employees by the Intervenor, such mailings were mailed to their homes. The Intervenor, having been incumbent for many years, had accumulated home addresses of employees. Further, officials of the Intervenor testified that many hours were spent with telephone directories locating addresses of employees for whom it had no addresses on file. 8/

7/ The authorization forms used by the Petitioner to obtain its necessary 30% showing of interest for the filing of the petition did not call for home addresses of the signers.

8/ I will set forth my conclusions as to the issue of the Activity's duty to provide mailing service in conjunction with my conclusions relating to the next issue.

(3) The Right of Non-Employee Organizers to Conduct an Election Campaign on the Activity's Premises.

(a) Attempts of Non-employee Organizers of the Petitioner

As noted above, the Activity denied Petitioner and Intervenor use of bulletin boards, deskdrops, campaign tables, and physical access to its properties. The Activity instructed its managers and supervisory staff by written memoranda concerning the pending election, that such privileges would be improper. In a memorandum of September 11, 1970, the Activity advised its managers:

> "Subchapter 4, Section 8 of Chapter 711 in the Treasury Personnel Manual and the Customs Personnel Manual states that the Bureau of Customs should not authorize use of intra-office mail services, posters, meeting rooms, etc., for purposes of organization or election campaigning. The mailing of campaign literature to individual employees at their post of duty is prohibited. In addition, distribution of such literature is also prohibited during official duty hours. Nor can such literature be passed out on Government property without prior approval. As the Customs Service is normally a tenant on General Services Administration property, permission to distribute campaign literature on Government property must come from GSA. In no case, however, can such literature be distributed within office space leased and occupied by Customs."

In a subsequent memorandum to all managerial and supervisory employees, dated September 22, 1970, the Activity again warned that no permission had been granted to the unions the use of the Activity's facilities.

There was specific testimony offered by Petitioner with respect to experiences encountered in the conduct of the campaign at only a few locations. It would be well to summarize these experiences.

Regional Headquarters

Regional Headquarters of the Activity are located on the twenty-fourth floor of the John F. Kennedy Federal Building in Boston. Approximately forty-five unit employees work at Regional Headquarters. The twenty-fourth floor houses in addition to the Activity's headquarters, offices of Senator Edward Kennedy and an office of the Federal Mediation and Conciliation Service. The Boston area campaign for the Petitioner was handled principally by Pat Conte, National Representative. Although Conte was denied the use of bulletin boards, permission to set up a campaign table, permission to place literature on employees' desks, and permission to speak to employees on Activity property, he did, with assistance of others, distribute literature in the hall on the twenty-fourth floor at the elevators. In fact, on occasions, both the Petitioner and Intervenor distributed literature at the same time at the same location. The record reveals that all of the Activity's personnel must use the same elevators which exit at one location on the twenty-fourth floor.

United States Customs House

The United States Customs House houses the district headquarters of the Activity. Conte testified that he did distribute literature in the lobby but since other agencies were housed in the building he was not certain that he covered the customs employees.

Hoosac Pier

The Hoosac Pier is located in the Boston area. There were approximately seven unit employees employed at Hoosac. During the period between the execution of the agreement for election and the date of the election, on or about September 29, 1970 and other dates, Conte visited the pier during working hours, between 8 A.M. and 5:00 P.M. (This is a one shift operation in which the Customs employees work from 8:00 A.M. to 5:00 P.M. with one hour for lunch.) Various employers use this pier, as well as the Activity. Located on the pier is a long building, with offices of the Activity on each end, each office having an entrance to the parking lot. There is no lunch room or locker facilities for the Activity's employees on

the pier, and both offices consist solely of work area. Conte attempted to distribute material on the employees' desks, and sought to talk to employees during breaks. He was asked to leave by supervision. Conte did on occasion get to talk to some of the employees, who are uniformed, when they gathered around a mobile lunch wagon on the parking lot. There is no evidence that Conte attempted to distribute handbills to employees before and after working hours from the parking lot at the two entrances to the Activity's offices from which the employees obtained egress or ingress to the offices. 9/ There apparently was no restriction on organizers working on the parking lots.

Portland, Bangor, Calais, Hamilton and Van Buren, Maine

National Representative Guy Colletti was assigned to Maine. He visited the above locations in Maine between September 29 and October 2, 1970. He spoke to supervisors seeking permission to post material on bulletin boards, make desk drops, and to visit employees on the premises during non-duty hours or lunch. His requests were denied by supervision. He made no attempts to distribute handbills to the employees at the entrances to the locations as they arrived to and left from work. There is no showing by the Petitioner that these locations contained non-work areas.

9/ The Hoosac Pier is the only location specifically mentioned by Petitioner in its letter of December 2, 1970 expanding on its October 26, 1970 objections from which a representative was "ushered out" by a Customs supervisor. However, Conte testified to similar treatment at other locations in the Boston area, such as the Mystic Pier, East Boston Pier, and Logan International Airport, where he was denied permission by supervisors to make desk drops or talk to employees during coffee breaks or lunch periods on Activity property. However, there is no evidence that these locations contain non-work areas. Also, there is no evidence that Conte attempted to distribute handbills to employees at the entrances except at Logan Airport where he distributed handbills and spoke to employees on the sidewalk outside the offices.

Ogdensburg, New York

In Ogdensburg, N. Y., various posters announcing meetings of the Petitioner to be held at Rouses Point, N. Y., and Ogdensburg, N. Y. and other campaign material were sent or left at various facilities of the Ogdensburg District of the Activity to be posted and distributed by the facilities involved. The material was returned to the Petitioner's representative by the Activity's Regional Personnel Officer.

(b) Intervenor's Campaign

The local officers of the Intervenor are employees of the Activity, and they did most of the campaigning for the Intervenor, although they received some help from their national officers. There is no evidence in the record that the Intervenor was granted any privileges that were denied the Petitioner.

As noted above, the Intervenor mailed campaign literature to employees using addresses it accumulated during its tenure as representative at the Activity and addresses it obtained from studying telephone books. As far as personal contact was concerned, teams of Intervenor representatives made tours to various locations. They held meetings at night at some localities in meeting places off of Activity property. At some airports where employees of the Activity were stationed they rented rooms at the airport, and between flights employees would join them. The Petitioner points with suspicion to the fact that these employees seemed to have "breaks" to meet Intervenor representatives at the specific times they were on the scene. However, there is no evidence that the Activity had any part in arranging these meetings, scheduling breaks at particular times, or advising employees of the meetings. This was apparently accomplished by local employee members of the Intervenor.

Conclusions as to the Activity's duty to provide mailing service to employees at their duty station and the right of non-employee organizers to conduct an election campaign on the Activity's premises

The general policy of the Order as stated in Section 1(a) is to protect employees of the executive branch of the Federal Government in their right to form, join, and assist a labor organization or to

refrain from such activity. In the implementation of this policy, the Order, at Section 10, provides for a secret ballot election for employees in an appropriate unit to select a labor organization as their exclusive representative. The task of conducting such elections is given to the Assistant Secretary. It cannot be disputed that the employees must be given the opportunity to cast ballots free from any coercion or any restrictions which would prevent a free choice. It is also clear that to properly exercise a free choice the electorate should be given access to information from the parties on the ballot. Granting that full information is necessary, and the views of all the parties should be heard, the question of the extent of the obligation, if any, of the Activity to provide facilities for the dissemination of information by non-employee organizers, must be resolved.

The Order, itself, provides some clue to the problem in that it permits an Activity to provide the use of its facilities under certain circumstances. Thus, Section 19(a)(3) of the Order provides that Agency Management shall not, "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;". Thus, it is clear that the Activity, under the Order, could have granted Petitioner's request for use of its facilities, assuming the same privileges were also granted, upon request, to the Intervenor. However, while the Order provides that an agency "may," it does not by specific terms require that the Activity provide facilities for election campaigns, and in fact, at Section 20, the Order prohibits organizational efforts during working hours. The Assistant Secretary has already recognized that an Activity need not furnish facilities in all circumstances to non-employee organizers for campaign purposes even if they are to be used during non-duty hours. In Report Number 23, A Report on a Decision of the Assistant Secretary Pursuant to Section 6 of Executive Order 11491, issued February 3, 1971, the Assistant Secretary concluded in a situation where non-employee organizers sought to electioneer in work areas during lunch time where employees ate their lunch, that the Activity was under no obligation to allow non-employees to enter work areas for the purpose of electioneering.

The Supreme Court, has spoken in the private sector, to the issue of use of employer property for campaign purposes. In N.L.R.B. v. The Babcock & Wilcox Company, 351 U.S. 105 (1956), the Supreme Court pointed out that, while an employer may ordinarily protect his property by prohibiting non-employee distribution of literature thereon, the right of the employees to organize, with outside assistance, is also protected by law. In elucidating the general rule, the Court stated that:

> "[W]hen the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize."

Specifically, the Court stated that:

> "...if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property."

I am convinced that, inasmuch as the Assistant Secretary will take into account experience gained in the private sector, the rationale of the Supreme Court is appropriately applicable to the situation at hand.

With respect to the accessibility to employees by non-employee organizers, as will be explained below, the accord of use of the Activity's facilities for mailing material to employees at their duty station and the granting of other access to its property are bottomed on different considerations and my resolution of the two situations will be different.

Activity's Duty to Provide Mailing Service to Employees at their Duty Station

There were over 800 employees in the unit scattered over 50 locations in seven states. There are great distances between locations. Some locations utilize a handfull of employees and others utilize many

employees. Likewise, the employees' residences are scattered over the seven states. In such situations, sheer logistics would dictate that for practical pruposes the only reasonable means of communication with all the employees would necessitate the use of the mail. The National Labor Relations Board, pointing out the necessity for dissemination of information to afford employees a better position to make a more fully informed and reasoned choice in an election situation, has adopted a rule requiring an employer to provide the names and addresses of employees in the unit within a specified time after an election agreement is executed or an election is directed. 10/ The Board's rule applies to all election situations. However, as noted above, because of the dispersion of the unit, the necessity for mailing information is especially significant. 11/ In the instant case addresses were not furnished. In lieu of the furnishing of addresses, I find that the failure of the Activity to provide mailing services to the Petitioner effectively precluded the dissemination of information to the electorate, and interfered with the results of the election. 12/ Of course my finding necessarily requires that the same services be provided the Intervenor. My finding also is limited to the situation where an election was already agreed to (or one where the election is already directed), and it is not to be assumed that I would make such a finding if mailing services were not accorded in an organization situation prior to an agreement for an election or prior to the direction of an election. I am also restricting my finding to the facts herein where the unit is dispersed over a large geographical area. Whether use of an Activity's mailing facilities or the furnishing of addresses should be required in other situations is best left for future cases or consideration by the Assistant Secretary of the merits of adopting a rule similar to the Excelsior rule.

10/ Excelsior Underwear, Inc., 156 NLRB 1236 (1966). The Excelsior requirement for disclosure was approved by the Supreme Court in N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969).

11/ It is noted that the parties recognized the problems created by the dispersion of the unit in that they agreed to a mail ballot election.

12/ Necessarily the requirement that the Activity provide mailing services must be applied with reason. Thus, the Activity should not be inundated with continuous mailings.

In making my finding, I have borne in mind that the Intervenor, unlike the Petitioner, apparently was able to make substantial mailings of literature to employees. However, the Intervenor had been able to accumulate many home addresses because of its many years of incumbency at the Activity. The Petitioner had addresses for only approximately 180 employees, and to require the Petitioner to obtain addresses from a myriad of phone books goes beyond the requirement of "reasonable efforts."

With respect to the Activity's contention that the Treasury and Customs manuals prohibit receipt of personal mail at the work stations, I conclude that where such Agency prohibitions contravene the purposes of the Order they should not be determinative. In an analgous situation involving resolution of an unfair labor practice complaint, the Assistant Secretary stated:

> "Hence, neither the Study Committee's Report and Recommendations nor the Order itself require that in the processing of unfair labor practice complaints am I bound to accept as determinative those directives or policies of the Civil Service Commission, the Department of Defense or any other agency which in my view contravenes the purpose of this Order." [Emphasis supplied] 13/

Although the instant case does not involve an unfair labor practice complaint, the Assistant Secretary's reasoning is just as applicable to this situation where rights of employees under the Order are being interfered with. 14/

13/ Charleston Naval Shipyard, A/SLMR No. 1.

14/ The Activity's distinction in its brief of the Assistant Secretary's conclusion in the Charleston case and the instant case is minor.

Right of Non-employee Organizers
to Conduct an Election Campaign
on the Activity's Premises

My conclusion that mailing privileges should be accorded is based principally on consideration of the tremendous dispersion of the unit. This basis has no relevance with respect to non-employee organizers campaigning on the Activity's premises, as, if permitted, Petitioner's representatives would necessarily have to personally visit the various locations.

Applying the Supreme Court's Babcock & Wilcox rationale, the Petitioner, to sustain its burden of proof, must establish that it is unable by reasonable efforts through other available channels of communication (other than mail) to disseminate information to the employees. I have found above that the mail privilege should be afforded the Petitioner as an available channel of communication. With respect to the channels of personal campaign effort on the Activity's premises, the Petitioner has not met its burden of proof that the only reasonable means of communication with the employees is by visitation on the Activity's premises. 15/

Petitioner requested the right to speak to employees on non-working time during coffee and lunch breaks on the Activity's premises. There is no showing by the Petitioner that any of the localities of the Activity have non-working areas such as lunch facilities. With respect to localities in which evidence was presented by the Petitioner, such as the Hoosac Pier, there were no non-working areas. Desks were located in every room. As noted above, in Report No. 23 of the Assistant Secretary, the Assistant Secretary has held that an Activity is under no obligation to permit non-employee organizers to enter work areas for the purpose of electioneering, even on non-working time. Likewise, desk-drop privileges would require entry into work areas.

There was no showing by the Petitioner that it could not distribute handbills to employees on their way in and out of work. For example, at the Hoosac Pier and other locations, there are doors through which employees of the Activity are afforded ingress and egress to work from the parking lots. The Petitioner could have

15/ Section 202.20(d) of the Assistant Secretary's Regulations places the burden of proof on the objecting party.

stood outside these doors in the parking lots to distribute literature to employees as they arrived to and left from work. This was possible even though other employees used the piers, since there were entrances from the parking lots leading exclusively to the Activity's premises, and the Activity's employees were identifiable by their uniforms. 16/ At the Federal Building and Customs House in Boston, the Petitioner was able to handbill employees in the corridors and lobby. There was no evidence that at the remote locations of the Activity the Petitioner could not have distributed handbills to employees outside their work locations.

With respect to the furnishing of campaign tables and bulletin board privileges, the alternative means of distributing handbills described above was available. Moreover, I have already found above that another alternative means, mailing privileges, should have been afforded which would adequately serve the Petitioner's purposes in lieu of campaign tables and bulletin board privileges. 17/

The Activity and Intervenor point to other methods which allegedly were available to the Petitioner. They note that the Petitioner has five locals in the regions, and employees in the locals could be used for campaigning. They also note campaign literature was inserted in the Petitioner's newspaper which went to its members. However, these means were not effective since only approximately 108 employees of the Activity were members. Moreover, a labor organization is not required to depend only on employee efforts. A labor organization, to be effective in furthering the rights of employees guaranteed by the Order must also depend on the efforts of non-employee organizers.

16/ There is no showing that Petitioner's organizers were denied access to the parking lots. In fact, a Petitioner representative, on at least one occasion, spoke to employees on the Hoosac pier parking lot while they were visiting a mobile lunch wagon.

17/ The Petitioner also has not shown that it could not use other instruments of publicity such as newspaper ads, radio and television at least in the urban areas such as Boston, Buffalo and Providence. cf. For example, in the private sector, The Falk Corporation, 192 NLRB No. 100.

In its brief, the Petitioner cited several cases of the National Labor Relations Board and the Courts in which the rationale of Babcock & Wilcox, supra, was applied and non-employee organizers were permitted access to the employer's property. These cases are not binding on the Assistant Secretary; moreover all of them contained elements not present in the instant case and are readily distinguishable. I will not distinguish them all here, but will note a couple of them which typify the distinctions. For example, in S. & H. Grossingers, Inc., 156 NLRB 233, aff'd. 372 F.2d 26 (C.A. 2, 1967), the employer's premises was "home" for the employees, since they lived on the premises. In Central Hardware Co., 181 NLRB No. 74, e the Employer prohibited entrance of union representatives to its retail store, even as customers.

I conclude therefore that Petitioner has not sustained its burden of proving that the failure of the Activity to permit non-employee organizers access to its premises, for campaign purposes, other than the furnishing of mailing privileges, constituted conduct which interfered with the results of the election.

Recommendations

In view of all the above, I make the following recommendations:

(1) That the Assistant Secretary make a finding that the Petitioner's objections were timely filed and deny the motions to overrule the objections on the procedural grounds that they were untimely;

(2) That the Assistant Secretary overrule the Petitioner's objections relating to denial by the Activity of access to its premises by non-employee organizers to conduct a campaign (other than the furnishing of mailing services);

(3) That the Assistant Secretary sustain the Petitioner's objection relating to the Activity's failure to provide mailing service to employees at their duty stations;

(4) That the Assistant Secretary set aside the mail ballot election in which the ballots were counted on

October 16, 1970 and direct that a second election be conducted under the terms of the Order, and in accordance with the applicable rules and regulations of the Assistant Secretary.

HENRY L. SEGAL
HEARING EXAMINER

Dated at Washington, D. C.

JANUARY 21, 1972

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

DEPARTMENT OF INTERIOR,
BUREAU OF LAND MANAGEMENT,
RIVERSIDE DISTRICT AND LAND OFFICE
A/SLMR No. 170

The Petitioner, National Federation of Federal Employees, Local 119, (NFFE) sought an election in a unit composed of all of the Activity's nonprofessional General Schedule and Wage Board employees. The Activity agreed that the unit was essentially appropriate, but contended that maintenance employees should be excluded as they did not share a community of interest with other employees in the unit, and that certain of the employees sought by NFFE were professional employees and for that reason should be excluded from the unit.

The Assistant Secretary found the claimed unit appropriate. In this connection, he noted that the Activity was a distinct administrative subdivision; that the District Manager was responsible for all functions in the District; that he exercised control over personnel in the District; and that the claimed employees were subject to uniform personnel policies and programs. He determined also that the Wage Board employees in the petitioned for unit, whose work stations were located some distance from the Activity's headquarters where all other employees in the claimed unit were stationed, had a sufficient community of interest with other unit employees to warrant their inclusion in the unit.

In determining whether or not certain employees in issue (Realty Specialists, Outdoor Recreation Planners, and the Appraiser) were professional employees the Assistant Secretary determined that it would effectuate the policies of the Executive Order to define a professional employee for the purpose of unit placement as being: (A) Any employee engaged in the performance of work; (1) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from knowledge acquired by a general academic education, or from an apprenticeship, or from training in the performance of routine mental, manual, or physical processes; (2) requiring the consistent exercise of discretion and judgment in its performance; (3) which is predominately intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work); and (4) which is of such a character that the output produced or the result accomplished cannot be standardized

in relation to a given period of time; or (B) Any employee who has completed the courses of specialized intellectual instruction and study described in clause (A) above and is performing related work under the direction or guidance of a professional person to qualify himself to become a professional employee as defined in clause (A) above. In applying the criteria to the employees in dispute, the Assistant Secretary determined that while their work required the use of some limited independent judgment and discretion they were not professional employees because their jobs did not require advanced knowledge in a field of science or learning but rather required only a general academic education supplemented by limited specialized training and on-the-job training.

Also, the Assistant Secretary rejected a stipulation between the parties that employees in two classifications (Range Conservationists and Wildlife Management Specialists) were professional employees, as the evidence established that the positions occupied by such employees did not require any advanced knowledge in a field of science or specialized intellectual training. Rather, the record evidenced that these employees, like those in the disputed classifications, were required to have only a general academic education supplemented by on-the-job training. Finally, the Assistant Secretary accepted a stipulation that mining engineers were professional employees, as the record established that employees in this position required knowledge of an advanced type received in an institution of higher learning and that their work required the consistent use of judgment and discretion. Accordingly, employees classified as mining engineers were excluded from the unit.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF INTERIOR,
BUREAU OF LAND MANAGEMENT,
RIVERSIDE DISTRICT AND LAND OFFICE 1/

Activity

and

Case No. 72-RO-2763(25)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 119

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer John H. Crow. The Hearing Officer's rulings are free from prejudicial error and are hereby affirmed.

Upon the entire record, including a brief filed by the Petitioner, National Federation of Federal Employees, Local 119, herein called NFFE, the Assistant Secretary finds:

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

2. The NFFE seeks an election in a unit consisting of all of the nonprofessional General Schedule and Wage Board employees employed by the Activity, the Riverside District and Land Office, excluding managers, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, professional employees and supervisors as defined by the Order. The Activity

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

agrees that the unit sought is essentially appropriate, but contends, contrary to the NFFE, that all maintenance employees should be excluded as they do not share a community of interest with other unit employees and that employees employed in the classifications of Realty Specialist, Outdoor Recreation Planner and Appraiser are professional employees and, as such, should be excluded from the unit. It further contends in this latter regard that even if the employees in issue are not deemed to be professional employees, they do not share a community of interest with employees in the appropriate unit and, therefore, should be excluded,

The Bureau of Land Management is engaged in administering public lands. It is divided into two Service Areas, one headquartered at Denver, Colorado, and the other at Portland, Oregon. The Service Areas are divided along state lines, and the State Offices are, in turn, divided into district and land offices. The Portland Service Area covers five states, including California, where the Activity, along with several other district and land offices, are located. The Activity is engaged in administering 11,000,000 acres of public lands in Southern California, and employs a total of approximately 52 employees, including approximately 32 employees in the claimed unit. It is responsible for managing wildlife and recreation resources and for determining the private, as well as the public, use of the area it covers.

The Activity is under the supervision of the District Manager, and its operations are divided into four divisions and three resource area offices, all of which are located at Riverside, California. Three of the four divisions; Administration, Operations, and Resources Management, are headed by division supervisors and one division, Adjudication and Records, is headed by the Activity's Assistant Manager. Each resource area office is responsible for all aspects of resource management in a particular portion of the area administered by the Activity and is headed by a natural resource manager. All of the Activity's employees, with the exception of the three Wage Board employees, who are employed as maintenance men, are stationed at Riverside, California. The maintenance men are stationed in three of the Activity's four administrative resource areas. The Activity's personnel policies are uniform for all of its employees, and while some of these policies are determined at the Service Area level, the record reveals that the District Manager and his staff have authority with respect to hiring, reprimanding, rating and discharging employees. In addition, requests for leave are approved at the Activity level. The record reveals also that the District Manager is responsible for all functions performed in the District and that such functions are

performed without any significant supervision from the State or Service Area Offices of the Bureau of Land Management. In this regard, the District Manager is responsible for all initial decisions regarding the disposition and use of the land subject to the Activity's jurisdiction. 2/

Based on the foregoing, I find that the unit sought by the NFFE is appropriate for the purpose of exclusive recognition. In this connection, the evidence establishes that the Activity constitutes a distinct administrative subdivision of the Bureau of Land Management; that the District Manager is responsible for all functions within the District, and has initial decision-making authority over disposition of public lands within the District; that the District Manager exercises substantial control over personnel in the District; and that there are uniform personnel policies and programs for the employees within the claimed unit.

As to the three maintenance men who are the only Wage Board employees of the Activity and who are located outside Riverside, the record reveals that they and the General Schedule employees in the claimed unit, have the same overall supervision and personnel policies; their pay, leave, and personnel records are processed at central locations; and they are engaged in a common mission. In these circumstances, I find that the maintenance employees have a sufficient community of interest with the employees in the unit sought by the NFFE to warrant their inclusion in the unit I have found appropriate.

The Activity contends that the Realty Specialist, Outdoor Recreation Planner and Appraiser are professional employees who should be excluded from the claimed unit. The record reveals that these three classifications require the same minimum qualifications. Thus, new hires of the Activity are recruited from a Civil Service Commission register, and they enter service at the GS-5 or GS-7 grade levels depending on their education and prior experience.

While the Activity's new hires generally have college degrees with major areas of concentration in economics and/or biological sciences, there are no specific educational requirements. Rather, the only requirement is that the recruit appear on a Civil Service Commission register with a least a GS-5 rating. 3/ The evidence

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2/ The record reveals that the Activity's employees' payroll is handled at the headquarters of the Denver Service Area, and that personnel matters above the District level are handled by the headquarters of the Portland Service area.

3/ There are no special Federal Service Entrance Examinations for any of these classifications.

establishes that once a recruit enters on duty he receives six months of training at the Land and Mineral School at Phoenix, Arizona, in such subjects as the Code of Federal Regulations, the manner in which public land may be used, geology and the soil, and animals and plants located on public lands. The new hire also receives training in the kind of work he will be performing and the criteria he will be expected to apply when dealing with requests for land usage. Once the new hire completes his training at the Land and Mineral School, he receives a field assignment where, initially, his performance is supervised closely. As the new hire progresses in his work, the supervision over him lessens and, depending on the rate of his progress, he is promoted to the next grade level after one year of employment. The journeyman level for all three of these classifications is GS-9 which may be reached after a minimum of two years of employment for those who enter service at the GS-5 level and one year for those who enter at the GS-7 level. Promotions from GS-9 to GS-11 are on a competitive basis and, generally, require a minimum of two years experience at the GS-9 level.

While the basic qualifications for Realty Specialist, Outdoor Recreation Planner and Appraiser are substantially the same, their principal duties differ. Thus, the Realty Specialists are engaged in processing applications for use of the Activity's land. These applications include requests for entry, mining privileges, leasing, purchases, withdrawal of land from public use, and exchanges of public land for private land. Once Specialists receive applications, they determine the priority that should be assigned. They also determine if any other Federal agency, such as the Bureau of Indian Affairs on the Bureau of Reclamation, or local government bodies, as well as private parties, have an interest in the subject matter of the application. Thereafter, the Specialists investigate the land to determine such matters as its climate, topography, vegetation, hydrology, and soil. They also check the mineral content of the soil, consulting a mining engineer, if necessary. In addition, they consider the effect the proposed use of the land will have on the watershed, timber, recreation and wildlife, and determine whether the utilization of the land proposed in the application, which may involve business sites, home sites, desert land entries, homesteads, etc., is feasible and economically practical when compared to the land's existing use. In connection with their job function, the Specialists may interview applicants, and other interested parties, whether private or public, in order to obtain any information they deem relevant. Finally, the Specialists, with or without assistance from the Appraiser, may appraise the property to determine its value. 4/ Once the investigation is completed, the Specialists prepare a written report for the Resource Area Manager in which they may recommend

4/ Realty Specialists also investigate trespasses occurring on the Activity's land.

approval of the application, with or without restrictions, disapproval of the application, or recommend other land as an alternative to the land sought in the application. The Specialists generally perform most of their work independent of direct supervision, and their work requires the use of different principles depending on the special characteristics of the application involved.

The Outdoor Recreation Planners plan and coordinate the use of the Activity's land, water, and related resources, for recreation purposes with appropriate consideration given to protecting and enhancing the quality of the environment. They appraise the need for new or expanded outdoor recreation resources; identify and classify existing or potential recreation areas; develop and review recreation areas; and assist Federal, state and local governmental bodies and private organizations in developing and protecting the outdoor recreation environment and in providing recreation opportunities. To accomplish these objectives, the Outdoor Recreation Planners study the recreation possibilities for natural resources in a given area; the existing and potential use of the recreation resources by the visiting public; and plan for the area's present and future recreational usage. In the performance of such duties, the Outdoor Recreation Planners study records of Federal, state and local governmental agencies as well as records of public institutions, such as universities, regarding the potential recreational use for a given area. The Outdoor Recreation Planners also work with local volunteers and state and local officials in arriving at the best use for potential recreation areas. Once a project has been investigated thoroughly and all economic, sociological, biological, soil and water conservation factors have been taken into account, the Outdoor Recreation Planners submit written reports to the Resource Area Manager, in which they make proposals for the immediate and long range management and use of the land. The plan for the area may involve hunting, fishing, camping, hiking, horseback riding and motorcycle riding, boating, historic sightseeing, or one or more of a number of other recreational activities. The Outdoor Recreation Planners also act as advisors to their immediate supervisor, the Resource Area Manager, on which of the Activity's areas warrant a recreation program, and the type of recreation program needed. Finally, the Outdoor Recreation Planners are responsible for ensuring that the recreation program complies with the recreation policies of the Bureau of Land Management.

The Appraiser (the Activity currently employs one such employee) is responsible for determining the value of the Activity's land involved in sales, leases, and exchanges and also the private land involved in land exchanges. 5/ The Appraiser also provides technical

5/ While the Appraiser employed by the Activity received training at the American Institute of Real Estate Appraisers, such training was not required for his employment.

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assistance to the Realty Specialists, who, as noted above, occasionally perform appraisals, and checks the Realty Specialists' work for technical accuracy. The Appraiser also advises the Area Manager on work priorities. Although his work is reviewed, such reviews are limited, and generally, he works under little or no supervision.

While the parties disagree as to whether Realty Specialists, Outdoor Recreation Planners and the Appraiser are professional employees within the meaning of the Order, they stipulated that Range Conservationists, Mining Engineers and Wildlife Management Specialists are professional employees. The record reveals that while it is preferred that Range Conservationists have a background in biology, they are not required to have any specific amount of education. Range Conservationists are responsible for protecting the Activity's grazing lands. They determine whether such grazing lands require seeding or rehabilitation, taking into consideration such factors as water supply and the best method to protect the land's natural resources. Also, they participate in processing leases for grazing privileges.

Mining Engineers are required to have degrees in engineering and t be qualified to testify as experts on minerals in judicial proceedings. They conduct all of the Activity's mineral examinations and determine the value of such minerals. Also, they aid in determining whether particular land should be reserved for mining, assist in processing mining applications, and aid Appraisers in determining land values when minerals are involved.

Wildlife Management Specialists are recruited from the Federal Register and are expected to have a degree in biology. They are required to have a knowledge of wildlife management, as well as the ability to conduct wildlife habitat studies and perform animal censuses. When performing their work, they receive administrative supervision but little or no technical supervision.

The Activity contends that the Appraiser, Realty Specialists and Outdoor Recreation Planners are professional employees within the meaning of the Order because their duties require the use of independent judgment and discretion and are geared to a college education; they receive their promotions in two grade intervals; and they are considered professional employees by the Civil Service

Commission. 6/ On the other hand, the NFFE contends that the positions occupied by the employees in issue are not professional because they do not have specific educational requirements and are not required to have knowledge of an advanced type in a field of learning or science customarily acquired by a prolonged course of specialized intellectual instruction or study in an institution of higher learning or a hospital.

The Civil Service Commission has the responsibility under the Classification Act for the classification of positions. However, neither the Study Committee's Report and Recommendations nor the Order indicate that the Civil Service Commission's classification of a position as "professional" would be determinative for labor relations purposes under the provisions of Executive Order 11491. Similarly, there is no indication that an agency's characterization of a position as "professional" would be determinative under the Order.

The Executive Order treats professional employees in essentially the same manner as they are treated in the private sector under the National Labor Relations Act (NLRA). In this connection, both the Order and the NLRA give professional employees the option of whether or not they wish to be included in units with nonprofessional employees. However, there is no specific definition of "professional employee" set forth in the Executive Order. In these circumstances and noting the experience gained in the private and public sectors, I find that the following criteria for determining whether or not employees are professional employees will effectuate the purposes and policies of the Executive Order: A professional employee for the purpose of unit placement is:

> (A) Any employee engaged in the performance of work; (1) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged

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6/ In connection with its functions, the Civil Service Commission has not issued a formal definition of professional employees, but it has utilized the following criteria in determining whether or not employees are professional employees: (1) The work involved is not wholly manual, mechanical, agricultural, business, commercial, or the like, in character; (2) The work involved predominately intellectual or mental effort which is based on or utilizes educational training and the concurrent accumulation of a specifically organized body of knowledge which is educationally communicable; (3) The body of knowledge is being constantly augmented, extended, verified and studied for the purpose of making new discoveries and interpretations, finding new relationships and meanings, and improving the material and methods of the profession. Office of Labor-Management Relations Management Practices Manual No. IV-A, October 1971, pp. 8-9.

course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from knowledge acquired by a general academic education, or from an apprenticeship, or from training in the performance of routine mental, manual, or physical processes; (2) requiring the consistent exercise of discretion and judgment in its performance; (3) which is predominately intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work); and (4) which is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; or

(B) Any employee who has completed the courses of specialized intellectual instruction and study described in clause (A) above and is performing related work under the direction or guidance of a professional person to qualify himself to become a professional employee as defined in clause (A) above.

Based on the foregoing criteria, I find the Appraiser, Outdoor Recreation Planners and Realty Specialists are not professional employees within the meaning of the Executive Order. Thus, while the positions they occupy require the exercise of some discretion and judgment, they do not require knowledge of an advanced type in a field of science or learning, but rather require only a general academic education supplemented by a six month training course and on-the-job training. Moreover, the evidence establishes that there is no specific academic requirement for any of the three job classifications. In these circumstances, I shall include employees in these classifications in the appropriate unit with the other nonprofessional employees.

Regarding the status of the employees who the Activity and the NFFE stipulates to be professional employees, I find that Mining Engineers are professional employees within the meaning of the Order as they occupy positions which require knowledge of an advanced type in the field of engineering. Also, their work is predominately intellectual in character, requiring the consistent exercise of discretion and judgment. On the other hand, the record establishes that neither the Range Conservationists, nor the

Wildlife Management Specialists are professional employees. While both positions require the exercise of a limited degree of discretion and judgment and some specialized knowledge, they do not require a prolonged course of specialized intellectual instruction or study. Rather, these positions require a general academic education supplemented by experience and on-the-job training. In these circumstances, I find that the Range Conservationists and the Wildlife Management Specialists are not professional employees within the meaning of the Order, and, despite the parties' stipulation, I shall include them in the unit found appropriate. 7/

Based on the foregoing, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491:

All General Schedule and Wage Board Employees, including employees classified as Realty Specialist, Outdoor Recreation Planner, Appraiser, Range Conservationist, and Wildlife Management Specialist, but excluding employees classified as Mining Engineer, District Manager, Assistant District Manager, Assistant Manager, Administrative Officer, Supervisory Clerical Assistant, Public Information Officer, Supervisory Land Law Examiner, Supervisory Legal Administrator, Supervisory Natural Resource Specialist, Natural Resource Manager, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

7/ The parties stipulated and the record establishes that employees who occupy the positions of District Manager, Assistant District Manager, Assistant Manager, Administrative Officer, Supervisory Clerical Assistant, Public Information Officer, Supervisory Land Law Examiner, Supervisory Legal Administrator, Supervisory Natural Resource Specialist, and Natural Resource Manager are supervisors within the meaning of the Order. I shall, therefore, exclude them from the unit found appropriate.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate not later than 45 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 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 were not 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 119.

Dated, Washington, D. C.
June 26, 1972

W. J. Usery, Jr. Assistant Secretary of Labor for Labor-Management Relations

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

STATUE OF LIBERTY NATIONAL MONUMENT,
NATIONAL PARK SERVICE,
LIBERTY ISLAND, NEW YORK
A/SLMR No. 171

This representation proceeding involves a petition by Local 333, United Marine Division, National Maritime Union, AFL-CIO, (NMU) for a unit of all regular and regular part-time motorboat operators and deckhands employed on the Liberty Island launch, Liberty Island, New York. Alternately, the NMU sought a unit composed solely of the motorboat operators.

The Activity took the position that the proposed units were inappropriate because the employees in question did not possess a community of interest separate and distinct from the remaining Activity employees on Liberty Island and neither unit would promote effective dealings and efficiency of agency operations.

The Assistant Secretary determined that the requested units were not appropriate. In reaching this determination, he found that while the motorboat operators and deckhands were involved in an operation which, by its very nature, necessitated the employment of certain unique skills and requirements, they did not possess a clear and identifiable community of interest when viewed in the context of total Activity operations. In this regard, the Assistant Secretary noted that the employees in the requested units, boat operators and regular deckhands, were clearly an integral part of an entity requiring functional interdependence and flexibility in order to succeed in its mission and were regularly required to spend a significant portion of their time working in concert with other Activity employees in tasks unrelated to the boat. The Assistant Secretary noted also that the boat crew and other segments of the Activity's workforce were subject to the same personnel policies and practices, shared common overall supervision, operated under similar working conditions, and, in the case of the regular deckhands and laborers, were functionally interchangeable.

In these circumstances, the Assistant Secretary concluded that the employees sought by the NMU did not possess a community of interest separate and distinct from other Activity employees on the Island and that such a fragmented grouping would not promote effective dealings or efficiency of agency operations. Accordingly, he ordered that the petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

STATUE OF LIBERTY NATIONAL MONUMENT,
NATIONAL PARK SERVICE,
LIBERTY ISLAND, NEW YORK

Activity

and

Case No. 30-3983

LOCAL 333, UNITED MARINE DIVISION,
NATIONAL MARITIME UNION, AFL-CIO

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Saul J. Lubitz. 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, Local 333, United Marine Division, National Maritime Union, AFL-CIO, herein called NMU, seeks an election in the following unit:

> All regular and regular part-time motorboat operators and deckhands employed on the Liberty Island launch, Liberty Island, New York, excluding all other personnel employed by the National Park Service on Liberty Island, employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, management officials, and supervisors and guards as defined in the Executive Order. 1/

1/ The unit description appears as amended in the hearing.

In the alternative, the NMU indicated that it would agree to a unit composed solely of the motorboat operators.

The Activity takes the position that either of the alternative units sought by the NMU is inappropriate inasmuch as the employees in question do not possess a community of interest separate and distinct from the remaining Activity employees on Liberty Island and neither unit would promote effective dealings and efficiency of agency operations.

The National Park Service is charged with the operation and maintenance of the Statue of Liberty National Monument, and additionally is responsible for maintenance and security functions on Ellis Island. Open to visitors seven days a week throughout the year, the Monument is maintained to fulfill both an educational and a recreational purpose.

Overall administration of the Activity's operations is by a superintendent who reports to the Director of the National Park Service's New York District. Under the superintendent is an employee complement which ranges in size from approximately 40 during the winter to approximately 70 during the summer. To accomplish the Activity's mission, these employees are assigned to one of the following areas: (1) an Administrative Office which gives direction and clerical support to the Activity's staff; (2) an Interpretive Division (Visitor Services) which protects the area, interprets features, and provides facilities for the visiting public; and (3) a Maintenance Division (Area Services) responsible for the maintenance of facilities, buildings, grounds, and utilities, and for the care and operation of the Liberty II launch.

According to the record, it appears that because of its location, relatively small staff, unpredictable weather conditions and emergencies, and continuing flux of visitors, the Activity's operations require an unusual degree of functional interdependence to meet all needs. Toward this end, many employees of the Activity live in Government quarters on Liberty Island, work varying shifts, and are given flexible assignments wherein performance of duties unrelated to their usual functions may require crossing of divisional lines. In addition, several of the Activity's employees stand available for temporary detail to other locations within the New York District because of specialized skills. Thus, the record reveals that although the Activity's employees are segmented organizationally, they are part of a highly integrated operation.

The Maintenance Division is responsible for all work required to maintain, repair, and operate the Activity's physical facilities on both Liberty and Ellis Islands. In this regard, the Division's personnel perform indoor work such as cleaning visitor-use areas and repairing utility systems, as well as outdoor work relative to building maintenance, care of lawns and shrubbery, and operation and repair of the motor launch. Successful performance of this responsibility requires a workforce possessed of a variety of skills, ranging from janitors and laborers to refrigeration and air-conditioning mechanics and boat operators. The Division is comprised mainly of Wage Board employees under the overall direction of a maintenance supervisor, classified as GS-12, who has primary responsibility within the Division for job assignments, training of new employees, and the planning and completion of work. Intermediate supervision of each employee is exercised by a supervisor in charge of one of several general work areas, i.e., buildings and grounds, buildings and utilities, and boat operations. As noted above, however, most employees are assigned flexibly within these work areas, at times performing tasks in other sections of the Maintenance Division or in the remaining divisions of the Activity.

Following acquisition by the National Park Service, the motor launch, Liberty II, was designated as an area of operation within the Maintenance Division. 2/ It is utilized as a means of transporting people to various locations about the harbor, and for the pickup and delivery of freight and supplies. In addition, it serves to enable the employees in the claimed unit, the boat crew, to perform their quasi-security checks on both Liberty and Ellis Islands. Because the launch operates seven days a week and is available for use 16 hours each day, it is run by three rotating crews with each crew consisting of a boat operator and a deckhand.

The record indicates that the deckhands are usually WG-3 laborers who, generally, are assigned to work on the boat by the Maintenance Supervisor. While so assigned, deckhands aid in accomplishing the boat's purpose by performing such specific tasks as affixing ropes to piles, carrying materials onto and off the boat, and cleaning or painting in order to maintain the boat, docks, and related facilities. Although three WG-3 laborers regularly have been assigned to deckhand duties since their hire, the record reveals that 11 other individuals have been assigned temporarily to perform such functions since July 1, 1971. While their usual assignment involves regular laborer duties, most of the remaining WG-3 laborers on the Island also have been trained to handle deckhand functions and do so as frequently as every two weeks in the event of a regular deckhand's absence. Furthermore, record testimony indicates that due to breakdown, lack of demand for additional trips, or other factors, the motor launch is not in operation approximately 25 percent of the total time it is scheduled to run. During such periods of idleness, the regular deckhands are assigned to routine laborer duties, including mowing lawns and emptying trash.

2/ The record reveals that prior to its acquisition by the National Park Service, Liberty II was operated by a private concessionaire whose employees were represented by the NMU.

To operate the motor launch, the Activity employs several licensed boat operators, classified at the WG-10 level. Both regular and regular part-time boat operators ensure proper completion of all boat functions by keeping the boat on schedule, maintaining logs on trips, reporting on security checks, assisting deckhands in loading and unloading operations, performing minor preventive maintenance on the boat, and seeing to the safety of passengers and crew. For the 25 percent of the time that, as noted above, the motor launch is inoperable or its services are not needed, the boat operators are assigned general maintenance duties commensurate with their skills, e.g., rough carpentry, minor plumbing, and simple electrical repairs. Thus, the record indicates that the daily activities of the boat operators not only entail close working relationships with maintenance employees in other classifications, but additionally require a significant and regular expenditure of their time on maintenance work unrelated to the boat operation.

With respect to general personnel policies and practices, the record indicates that the Activity's actions in such matters are directed by the New York District's personnel office. Further, all of the Activity's employees are covered by the same agency procedures regarding hiring, job classifications, pay, promotion, discipline, discharge, sick and annual leave, and retirement. In addition, the Activity's employees share the same coffee rooms and the same locker facilities. Also, they are subject to the same grievance procedure and applicable training programs, and participate in Activity-wide incentive awards and safety programs.

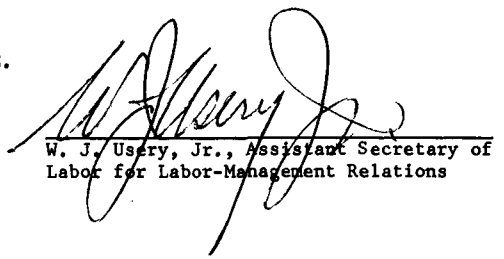
In these circumstances, while noting that the motorboat operators and deckhands are involved in an operation which, by its very nature, necessitates the employment of certain unique skills and requirements, nevertheless, I find that they do not possess a clear and identifiable community of interest when viewed in the context of total Activity operations. In this regard, the employees sought are clearly an integral part of an entity requiring functional interdependence and flexibility in order to succeed in its mission. For example, the record discloses that both the boat operators and the regular deckhands are regularly required to spend a significant portion of their time working in concert with other Activity employees in tasks unrelated to the boat. Moreover, it is apparent that the boat crew and other segments of the Activity's workforce are subject to the same personnel policies and practices, share common overall supervision, operate under similar working conditions, and, in the case of the regular deckhands and laborers, are functionally interchangeable. Based on the foregoing, I find that the unit sought initially, as well as the alternate unit requested by the NMU, are not appropriate for the purpose of exclusive recognition under Executive Order 11491 inasmuch as the employees in question do not share a community

of interest separate and distinct from other Activity employees on the Island and inasmuch as such a fragmented grouping would not promote effective dealings or efficiency of agency operations. Accordingly, I shall order that the NMU's petition be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 30-3983 be, and it hereby is, dismissed.

Dated, Washington, D.C.
July 13, 1972



W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

July 13, 1972

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

U.S. DEPARTMENT OF AGRICULTURE,
AGRICULTURAL MARKETING SERVICE,
GRAIN DIVISION, GRAIN INSPECTION
BRANCH, COMMODITY INSPECTION BRANCH,
NORTHERN REGIONAL OFFICE,
MINNEAPOLIS FIELD OFFICE
A/SLMR No. 172

The subject case involved representation petitions filed by National Federation of Federal Employees, Local 14 (NFFE). In one petition NFFE sought a unit of all General Schedule (GS) professional and nonprofessional employees of the grain and commodity inspection branches of the Activity; in a second petition, it sought a unit of all GS professional and nonprofessional employees of the market news branch of the Activity; and in a third petition it sought to represent all GS professional and nonprofessional employees of the seed inspection branch of the Activity.

The Assistant Secretary found that the evidence received during the hearing did not provide a sufficient basis upon which a decision could be made as to the appropriateness of any of the units. In reaching his decision, the Assistant Secretary noted that only limited evidence was presented in regard to job duties and functions and other terms and conditions of employment of employees in the various branches of the Grain Division in the Minnesota Field Office covered by the petitions, and that no evidence was presented as to employees of the remaining two branches of the same Division. Also, he noted that the evidence was insufficient both as to lines of supervision of certain branches and higher headquarters, and as to the status of a temporary employee.

Accordingly, the Assistant Secretary remanded the cases to the appropriate Regional Administrator for further hearing.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF AGRICULTURE, AGRICULTURAL MARKETING SERVICE, GRAIN DIVISION, GRAIN INSPECTION BRANCH, COMMODITY INSPECTION BRANCH, NORTHERN REGIONAL OFFICE, MINNEAPOLIS FIELD OFFICE

Activity

and Case No. 51-1978

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 14

Petitioner

U.S. DEPARTMENT OF AGRICULTURE, AGRICULTURAL MARKETING SERVICE, GRAIN DIVISION, MARKET NEWS BRANCH, MINNEAPOLIS FIELD OFFICE

Activity

and Case No. 51-2065

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 14

Petitioner

U.S. DEPARTMENT OF AGRICULTURE, AGRICULTURAL MARKETING SERVICE, GRAIN DIVISION, SEED BRANCH, MINNEAPOLIS FIELD OFFICE 1/

Activity

and Case No. 51-2066

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 14

Petitioner

1/ The names of the Activities in Case Nos. 51-1978, 2065 and 2066 appear as amended at the hearing.

DECISION AND REMAND

Upon petitions duly filed under Section 6 of Executive Order 11491, a consolidated hearing was held before Hearing Officer John R. Kegley. 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 organization involved claims to represent certain employees of the Activities.

2. In Case No. 51-1978, the National Federation of Federal Employees, Local 14, herein called NFFE, seeks an election in the following unit: All General Schedule professional and nonprofessional employees at the Minneapolis grain and commodity inspection branch, Minneapolis, Minnesota, excluding supervisors, managerial employees, guards and employees engaged in Federal personnel work in other than a purely clerical capacity.

In Case No. 51-2065, the NFFE seeks an election in the following unit: All General Schedule professional and nonprofessional employees at the Minneapolis market news branch, Minneapolis, Minnesota, excluding supervisors, managerial employees, guards and employees engaged in Federal personnel work in other than a purely clerical capacity.

In Case No. 51-2066, the NFFE seeks an election in the following unit: All General Schedule professional and nonprofessional employees at the Minneapolis seed inspection branch, Minneapolis, Minnesota, excluding supervisors, managerial employees, guards and employees engaged in Federal personnel work in other than a purely clerical capacity.

As an alternative, the NFFE stated that it would represent employees in any unit found appropriate for the purpose of exclusive recognition. The Activity took the position that the unit of grain and commodity inspection branch employees requested by the NFFE in Case No. 51-1978 is an appropriate unit, but that the units requested in Case Nos. 51-2065 and 2066 are inappropriate based, in part, on the limited number of employees in such units.

The evidence established that the Grain Division of the Agricultural Marketing Service of the Department of Agriculture involved in this proceeding is composed of six branches; grain inspection branch, commodity inspection branch, (employees of these two branches compose the proposed unit in Case No. 51-1978), market news branch (this branch encompasses the unit sought in Case No. 51-2065), seed inspection branch (this branch encompasses the unit sought in Case No. 51-2066), plant variety protection branch, and standardization branch.

Although testimony and other evidence was presented regarding the numbers and classifications of employees in the units petitioned for, no evidence was adduced in this regard as to the remaining two branches of the Grain Division, i.e., plant variety protection and standardization. Additionally, while there was testimony with regard to the duties and functions of employees in the grain and commodity inspection branches, 2/ only limited testimony was presented as to the duties and functions of employees in the market news and seed inspection branches, and no testimony was presented relating to the duties and functions of employees in the remaining two branches. Further, insufficient testimony was obtained regarding the working conditions of employees, their physical location, and transfer and interchange, if any. The record also is not clear as to the chain of command of the grain and commodity inspection branches. Thus, while the testimony reflects that the supervisor of these two branches reports directly to the Division Director who is located in Hyattsville, Maryland, other evidence reveals that there is an intervening regional office level between the two branches and the Director's Office. In this regard, there is no evidence as to what control, if any, is exercised over the two branches by the regional office which apparently is located in Chicago, Illinois.

The record disclosed also that there is a temporary employee who is employed in the grain and commodity inspection branches. However, there was no testimony as to the classification, job duties and functions of this employee, or his relationship with employees in the various branches covered by the petitions 3/, nor was there any evidence as to whether or not there are additional temporary employees in any of the other branches of the Grain Division.

Accordingly, in my view, the record does not provide an adequate basis on which to determine the appropriateness of the units being sought. Therefore, I shall remand the subject cases to the appropriate Regional Administrator for the purpose of reopening the record in order to secure the additional evidence discussed above.

2/ However, of the eight job classification descriptions presented by the Activity as exhibits, three were illegible, either in whole or in part, and seven of the descriptions related to supervisory positions rather than to classifications of employees covered by the petition.

3/ The parties did not take a position as to whether or not the temporary employee should be included in any unit found appropriate.

ORDER

IT IS HEREBY ORDERED that the subject cases be, and they hereby are, remanded to the appropriate Regional Administrator.

Dated, Washington, D. C.
July 13, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

July 20, 1972

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

FEDERAL AVIATION ADMINISTRATION,
DEPARTMENT OF TRANSPORTATION
A/SLMR No. 173

The subject case involves a representation petition filed by the Professional Air Traffic Controllers Organization, affiliated with Marine Engineers Beneficial Association, AFL-CIO (PATCO). The American Federation of Government Employees, AFL-CIO (AFGE), the Federal Aviation Science and Technological Association, National Association of Government Employees (NAGE), the International Association of Machinists and Aerospace Workers, AFL-CIO (IAM), and the National Federation of Federal Employees (NFFE) intervened in the case, but the IAM and the NFFE withdrew from the proceedings during the hearing. The PATCO sought a unit which encompassed all of the Activity's air traffic control specialists (controllers) employed at air traffic control towers (towers), air traffic control centers (centers) and combined-station-towers.

The NAGE and the AFGE contended that the petition by PATCO was barred at the control facilities that were covered by current negotiated agreements at the time the petition was filed and at facilities where the exclusive bargaining agent achieved recognition within the twelve-month period immediately preceding the filing of the petition. The PATCO contended that its petition was not barred: (1) by negotiated agreements which were awaiting approval at a higher level of management at the time the petition was filed; (2) by agreements where local representation petitions were filed timely subsequent to the filing of the PATCO petition and all the negotiated agreements which would expire prior to the issuance of the decision herein; (3) by agreements where the bargaining agents were "defunct;" (4) by agreements that were being continued in effect by virtue of automatic renewal clauses and the bargaining agent had allegedly been inactive; (5) by an agreement which had allegedly been terminated by the bargaining representative's attempt to renegotiate it; (6) by an election held subsequent to the PATCO petition in which the employees voted against exclusive recognition; and (7) by certifications which were granted within 12 months of the time its petition was filed, because all such certifications would expire by the time the decision in this case is issued.

The Assistant Secretary found that Section 202.3(c) of the Assistant Secretary's Regulations did not require that negotiated agreements awaiting approval at a higher level of management be in effect in order to constitute agreement bars. He further found that where a petition seeks a broad unit which covers less comprehensive units that are covered by current agreements and/or recent certifications that the date for determining if such agreements and certifications constitute election bars is the date the petition is filed, and that subsequent events would not render such bars inoperative. The Assistant Secretary also found that agreements where the bargaining agent is "defunct" when a petition is filed do not constitute agreement bars. In reaching this conclusion, the Assistant Secretary determined that a bargaining agent is defunct when it is unwilling or unable to represent the employees in its exclusively recognized or certified unit, but that the mere temporary inability to function, standing alone, would not establish defunctness. However, the Assistant Secretary limited the evidence to be considered in establishing defunctness to those facts which predated the filing of the petition and those facts that, although occurring after the filing of the petition, constitute an integral part of the events which predated the petition. In applying the above standard, he determined that the bargaining agent in two of the units covered by the PATCO petition were defunct because the record evidenced that at the time the petition herein was filed, the exclusive bargaining representative was, in fact, defunct. In addition, the Assistant Secretary rejected the PATCO's contention that those negotiated agreements which were in effect by virtue of automatic renewal clauses and where the exclusive bargaining representative was allegedly inactive, constituted agreement bars, as there was no evidence the exclusive representative was defunct.

The Assistant Secretary further found that where a recognized unit contained other employees in addition to controllers, such as teletypists, and the PATCO sought to represent only controllers, the Assistant Secretary, in accordance with the policy set forth in Federal Aviation Administration, Department of Transportation, A/SLMR No. 122 and United States Naval Construction Battalion Center, A/SLMR No. 8, declined to sever the controllers from the existing unit because there was no evidence that the incumbent labor organization had failed to represent the controllers in a fair and effective manner. Additionally, the Assistant Secretary found in accord with his decisions in Federal Aviation Administration, Department of Transportation, A/SLMR No. 122 and Department of Interior, Bureau of Indian Affairs, Navajo Area, Gallup, New Mexico, A/SLMR No. 99, that employees who had participated in a representation election which did not result in the certification of a labor organization subsequent to the time the PATCO filed its petition were not barred from being included in the unit sought by the PATCO as the PATCO petition was neither for the same unit, nor a subdivision of the unit which was involved in that election. Finally, in view of the Secretary of Transportation's

determination under Section 3(c) of the Order, the Assistant Secretary excluded controllers located in the Panama Canal Zone from any unit found appropriate.

In all the circumstances, the Assistant Secretary found that a unit comprised solely of controllers employed at centers, towers and combined-station-towers was appropriate for the purpose of exclusive recognition. He noted that such employees possess skills clearly distinguishable from other occupational groups; that their training, recruitment and career ladders differed from other occupational groups; and that there was little or no interchange among controllers and other Activity employees.

The Assistant Secretary found further that a nationwide unit of controllers was appropriate as all controllers shared the same basic skills, training, functions, and responsibilities; and personnel and labor relations policies effecting the controllers were promulgated at the national level. Under these circumstances, the Assistant Secretary concluded that the claimed unit, as modified, was appropriate for the purpose of exclusive recognition and that such a unit would promote effective dealings and efficiency of agency operations. Accordingly, he directed an election in a residual nationwide unit of controllers.

The Activity contended, contrary to PATCO, that instructors at the Activity's training academy; evaluation and proficiency development specialists (EPDS); flow controllers; area specialists; military liaison and security specialists; and planning and procedures specialists, should be excluded from the appropriate unit as managerial and/or supervisory employees. The Assistant Secretary found that instructors at the FAA Academy, Oklahoma City, Oklahoma, were not managerial or supervisory employees because they were not engaged in formulating Activity policy and had no authority to effect the tenure of student controllers. However, the Assistant Secretary excluded the instructors from the unit found appropriate based on the view that they did not share a community of interest with the controllers as they were engaged in teaching and did not work at control facilities or perform the same functions as performed by other controllers in the claimed unit. The Assistant Secretary concluded also that the EPDS were supervisors within the meaning of the Order in view of their role in evaluating the job performances of controllers undergoing training and in effectively determining the future of job status of such employees. Accordingly, the Assistant Secretary excluded EPDS from the unit found appropriate.

The Assistant Secretary found in accord with his decision in Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, A/SLMR No. 135,

that as the flow controllers, area specialists, military liaison and security specialists, and planning and procedure specialists did not have the authority to make or to influence effectively the making of Activity policy, they were not managerial employees and were, therefore, eligible for inclusion in the unit found appropriate. The record revealed that their duties required a thorough knowledge of controller techniques and skills, and that their role in policy matters was that of skilled experts providing resource information, and that they did not participate in determinations as to what the ultimate policy would be.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL AVIATION ADMINISTRATION,
DEPARTMENT OF TRANSPORTATION

Activity

and

Case No. 22-2603

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION
affiliated with MARINE ENGINEERS BENEFICIAL
ASSOCIATION, AFL-CIO

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Intervenor

and

FEDERAL AVIATION SCIENCE AND TECHNOLOGICAL
ASSOCIATION, NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES

Intervenor 1/

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Earl T. Hart. 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 name of this Intervenor appears as amended at the hearing.

1. The labor organizations 2/ involved claim to represent certain employees of the Activity.

2. The Petitioner, Professional Air Traffic Controllers Organization, affiliated with Marine Engineers Beneficial Association, AFL-CIO, herein called PATCO, seeks a nationwide unit of all Air Traffic Control Specialists, GS-2152, herein called controllers, including those assigned to combined-station-towers, excluding controllers currently represented exclusively at the Activity's Tulsa, Oklahoma facility by the IAM, controllers, R-D, GS-2152 employed at the Test Evaluation Division, National Aviation Experimental Center in Atlantic City, New Jersey, Flight Service Specialists (FSS), GS-2152, assigned to flight service stations, 3/ Evaluation and Proficiency Development Officers, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in the Order. 4/

The Intervenors, Federal Aviation Science and Technological Association, National Association of Government Employees, herein called NAGE, and the American Federation of Government Employees, AFL-CIO, herein called AFGE, contend that the petition in the subject case improperly includes controllers covered by current negotiated agreements and controllers presently included in units where labor organizations obtained certifications as exclusive representatives within the 12 month period preceding the filing of the PATCO petition. PATCO contends that it is not barred from including in its claimed unit those controllers who are covered by negotiated agreements with labor organizations other than PATCO, which agreements were awaiting approval at a higher level of management at the time the PATCO petition was filed; those controllers at individual facilities who were covered by valid negotiated agreements at the time the PATCO petition was filed but where timely representation petitions were filed subsequently at the facility level; those controllers at facilities where valid recognition and/or certification bars existed at the time the petition herein was filed, but where such bars will have expired prior to the date of the decision in this matter; those controllers at facilities where there are current negotiated agreements but where the bargaining representatives are defunct; and those controllers at facilities where there are negotiated agreements which have been in effect since 1967 by virtue of automatic renewal clauses, but where the bargaining representatives have been inactive. PATCO also seeks to include controllers at one facility where a negotiated agreement was allegedly terminated prior to the filing of the petition herein as a result of an attempt by the bargaining representative to renegotiate its agreement. Finally, the PATCO seeks to include in its claimed unit those controllers who voted against exclusive representation in a representation election within the twelve-month period immediately preceding the filing of the subject petition.

2/ The International Association of Machinists and Aerospace Workers, AFL-CIO (IAM) and the National Federation of Federal Employees (NFFE) initially intervened in this proceeding but subsequently withdrew during the hearing.

3/ While the FSS and the controllers are both under the GS-2152 series and are both designated formally as air traffic control specialists, those air traffic control specialists employed at flight service stations and international flight service stations commonly are referred to as flight service specialists whereas those employed at centers, towers and combined-station-towers are commonly referred to as air traffic control specialists or controllers.

4/ The unit appears as amended at the hearing.

I. ALLEGED BARS TO THE PATCO PETITION

The history of collective bargaining on an exclusive basis involving the Activity's Air Traffic Control Towers (towers), Air Traffic Control Centers (centers), and combined-station-towers, (herein referred to collectively as control facilities), is limited to facility-wide units and, currently, the controllers at some 78 of the some 347 control facilities are represented by exclusive bargaining representatives. The controllers at 65 of the 78 control facilities are represented by the NAGE; at 9 control facilities they are represented by the AFGE; at 2 control facilities they are represented by the PATCO; at 1 control facility they are represented by the Seattle Center Controllers Union; and at 1 control facility by the IAM.

The record reveals that the Activity and the NAGE (or NAGE locals) were parties to negotiated agreements at the time the PATCO petition herein was filed covering controllers at the towers located at Atlantic City, New Jersey; Buffalo, New York; New Castle, Delaware; Richmond, Virginia; Roanoke, Virginia; Knoxville, Tennessee; and Miami, Florida; the centers located at Washington, D.C.; Minneapolis, Minnesota; Quonset, Rhode Island; Jacksonville, Florida; Boston, Massachusetts; Miami, Florida; and Fort Worth, Texas; and the combined-station tower located at Providence, Rhode Island. Also, at the time the petition was filed, the Activity had negotiated agreements with the AFGE covering controllers at the towers located at the Anchorage International/Lake Hood Tower, Alaska, and Norfolk, Virginia, and the combined-station-towers located at Farmington, New Mexico, and Shreveport, Louisiana. In addition, the evidence reveals that the Activity has a current negotiated agreement with the IAM covering the controllers at the Tulsa, Oklahoma tower which PATCO agreed constituted a bar to a representation election at that facility. The record establishes that the PATCO

petition herein was not timely filed within the meaning of Section 202.3(c) of the Assistant Secretary's Regulations, 5/ insofar as it included employees in the above-noted units covered by negotiated agreements. However, the PATCO contends that the particular circumstances present in this case render these agreements invalid for agreement bar purposes and, accordingly, the employees covered by such agreements should be included in its claimed unit.

(a) Agreements awaiting approval at a higher management level.

PATCO contends that the negotiated agreements between the NAGE and the Activity which cover the controllers employed at the centers located at Jacksonville, Florida, and Fort Worth, Texas and the tower located at Knoxville, Tennessee, do not constitute bars to its petition because such negotiated agreements were awaiting approval at a higher management level at the time its nationwide petition was filed and they did not become effective until after the filing of such petition. In this regard, the PATCO asserts that a negotiated agreement which is awaiting approval at a higher level of management should not constitute a bar to an election until it becomes effective and that the effective date of the agreement, rather than its execution date, should be controlling for bar purposes. Section 202.3(c) of the Assistant Secretary's Regulations does not require than an agreement be in effect while awaiting approval at a higher management level in order for such an agreement to constitute a bar to an election petition in the unit it covers. In these circumstances, and noting that there are no factors in this case which, in my view, would warrant a departure from the specific requirements of Section 202.3(c), I find that the negotiated agreements which were awaiting approval at higher management levels and which covered the controllers employed at the centers located at Jacksonville, Florida, and Fort Worth, Texas and the controllers employed at the tower at Knoxville, Tennessee, constituted bars to the inclusion of the controllers at these facilities in the claimed unit.

(b) Subsequent timely petitions at the facility level.

PATCO contends that the negotiated agreements between the Activity and the NAGE which covered the controllers at the towers located at Miami, Florida; Richmond, Virginia; and Roanoke, Virginia; and the centers located at Miami, Florida, and Washington, D.C., which constituted valid bars to an election in such units on the date the PATCO petition herein was filed, no longer bar the inclusion of those units in the claimed unit because of the subsequent filing of timely individual representation petitions for the employees in these units at the facility level and because all of the negotiated agreements will have expired by the time the decision herein is issued by the Assistant Secretary. For essentially the same reason, the PATCO seeks to include the Anchorage International/Lake Hood Tower, Alaska, where the controllers were covered by a negotiated agreement between the AFGE and the Activity at the time the subject petition was filed but where a timely decertification petition has been filed subsequent to the PATCO petition in the instant case. PATCO contends that the controlling date for determining whether an agreement bar exists should be the date the decision in the subject case is issued rather than the date on which the nationwide petition was filed.

Contrary to the contention of the PATCO, I find that employees in units covered by valid negotiated agreements, which were in effect at the time the PATCO filed its petition in this matter, and which constituted valid bars at the time of the filing of the PATCO petition, may not be included in the claimed unit. Thus, where, as here, a petition for a broad unit seeks to include employees who are already represented exclusively in a less comprehensive exclusively recognized unit and who are covered by a valid existing negotiated agreement which constitutes a bar at the time such petition is filed, I find that such employees may not automatically be included in the broad petitioned for unit on the basis of the filing of subsequent timely petitions at the level at which the bar exists or upon the expiration of a negotiated agreement during the pendency of the determination with respect to the appropriateness of the broad unit. In my view, a contrary holding would lead to unwarranted instability and uncertainty in labor relations and would be inconsistent with the purposes and policies of the Executive Order. To achieve stability and certainty, therefore, I find that the question whether a bar exists is to be determined on the basis of facts as they exist as of the time a petition is filed rather than on the basis of some speculative future date. In this case, therefore, the key date would be the date the PATCO petition in the subject case was filed, June 7, 1971.

(c) Defunctness.

PATCO contends that the current negotiated agreements covering the controllers employed at towers located at New Castle, Delaware, and Norfolk, Virginia; the combined-station-towers located at Farmington, New Mexico, and Shreveport, Louisiana; and the center located at Minneapolis, Minnesota, do not constitute bars to its petition in this case because the exclusive representatives who are parties to such agreements are defunct.

Regarding the tower at New Castle, Delaware, the evidence reveals that in October 1965, the Activity recognized the NAGE as the exclusive bargaining

5/ Section 202.3(c) provides, "When there is a signed agreement covering a claimed unit, a petition for exclusive recognition or other election petition will not be considered timely if filed during the period within which that agreement is in force or awaiting approval at a higher management level, but not to exceed an agreement period of two (2) years, unless (1) a petition is filed not more than ninety (90) days and not less than sixty (60) days prior to the terminal date of such agreement or two (2) years, whichever is earlier, or (2) unusual circumstances exist which will substantially affect the unit or the majority representation."

representative of a unit which now includes approximately 11 controllers. Thereafter, the parties entered into an agreement, effective on June 16, 1966, which contained an automatic renewal clause. 6/

The record shows that the NAGE local at the New Castle, Delaware facility held its last official meeting in October 1970, and by February of 1971 all unit employees had terminated their NAGE memberships, and all the assets of the local had been distributed to the former members. Also, during January 1971, the former president of the local advised the Department of Labor on a prescribed reporting form that the local had been disbanded. Although at the hearing the NAGE national representative expressed a willingness to continue to represent the employees in the unit, the record reflects there has been no representational activity on behalf of the NAGE at the Activity's New Castle, Delaware facility since October, 1970.

The Activity recognized the AFGE as exclusive bargaining agent of the approximately 37 controllers at the tower at Norfolk, Virginia, on October 23, 1963. Subsequently, an AFGE local union was established and a negotiated agreement was executed by the local and the Activity, effective on May 27, 1965. This agreement continued in effect by virtue of an automatic renewal clause. There is no record evidence indicating that the unit was "defunct" at the time the petition in the instant case was filed on June 7, 1971. 7/

Regarding the combined-station-tower at Farmington, New Mexico, the evidence reveals that the AFGE was recognized on February 13, 1967, as the exclusive bargaining representative of a unit, which includes approximately 14 controllers. A local was established and it entered into a negotiated agreement with the Activity on January 6, 1969. The agreement contained an automatic renewal clause. The evidence reveals that the AFGE in September 1970 notified the local that the latter was being disbanded"retroactive to September 1969." In July 1971, the former president of the local advised the Activity that the local had been disbanded and its charter revoked and requested that the negotiated agreement be cancelled. The Activity thereafter cancelled the agreement on October 20, 1971. 8/

6/ The agreement was excuted by a NAGE local and did not name the national union as a party.

7/ The only evidence to support the PATCO's contention that the bargaining representative at Activity's Norfolk facility is "defunct" is contained in a letter dated December 7, 1971, from officials of the AFGE local to certain national officials of the AFGE stating that the local was being disbanded effective October 1, 1971. This evidence was rejected by the Hearing Officer because it postdated the PATCO petition of June 7, 1971. For the reasons set forth later in this decision, I affirm the ruling of the Hearing Officer.

8/ While the AFGE now contends that its prior agreement constituted a bar to the inclusion of the employees at the Farmington facility in the unit petitioned for by the PATCO, it appears that it had not, as of the date of the hearing in this case, taken any action to attempt to reinstate the previously cancelled agreement.

The evidence reveals that on February 13, 1967, the Activity recognized the AFGE as the exclusive representative of a unit, which currently includes approximately 36 controllers at the combined-station-tower at Shreveport, Louisiana. An AFGE local was established and a two year agreement was executed between the local and the Activity effective July 31, 1970. There was no evidence presented concerning the defunctness of the AFGE local at the Shreveport facility in the period prior to the filing of the PATCO petition in the subject case. 9/

Regarding the center at Minneapolis, Minnesota, the evidence reveals that on June 10, 1965, the Activity recognized the NAGE as the exclusive representative of a unit which currently includes approximately 338 controllers. A local union was established, and a negotiated agreement containing an automatic renewal clause was executed effective July 6, 1966. The evidence reveals that all the officials of the NAGE local resigned during the spring of 1971, and a national officer of the NAGE was appointed to administer the negotiated agreement and to conduct the other affairs of the local. The record shows that dues currently are being collected from NAGE members and that such dues, which normally would be returned to the local by the national, are being held in escrow until the local is reestablished. NAGE maintains that it is willing and able to administer the existing agreement and that it will process grievances, upon request, by the members of the bargaining unit.

The purposes and policies of the Executive Order are aimed at providing employees with an opportunity to participate in the formulation and implementation of personnel policies and practices affecting their conditions of employment through representatives of their own choosing. In my view, it will effectuate such purposes and policies to permit employees who are covered by an otherwise valid negotiated agreement to express their collective bargaining wishes in a representation election resulting from a petition filed by another labor organization if their exclusively recognized or certified representative is, in fact, "defunct." In this connection, I find that an exclusively recognized representative is "defunct" when it is unwilling or unable to represent the employees in its exclusively recognized or certified unit. However, the mere temporary inability to function does not constitute defunctness. I further find that where, as here, a petition for a broad unit seeks to include certain employees who are represented exclusively in less comprehensive units, and who are covered by existing negotiated agreements, it will effectuate the purposes and policies of the

9/ The only evidence presented regarding defunctness of the AFGE local at the Shreveport facility is contained in a letter, dated November 24, 1971, in which certain officials of the AFGE local union advised the Activity that there were no longer any AFGE members in the local. This evidence was rejected by the Hearing Officer on the same basis as noted in footnote 7 above.

Executive Order to limit the evidence to be considered in determining whether the exclusive representative is "defunct" to those facts that predate the filing of the petition, and those facts that, although occurring after the filing of the petition, constitute an integral part of events which predated the petition. 10/

Based on the foregoing circumstances, I find that the exclusive representatives at the tower at Norfolk; the combined-station-tower at Shreveport and the center at Minneapolis were not defunct at the time the subject petition was filed. Consequently, the negotiated agreements which covered those bargaining units bar their inclusion in the broader unit sought by the PATCO in the subject case. Thus, the only evidence regarding the alleged defunctness of the Norfolk and Shreveport units involved events which occurred subsequent to the filing of the petition in this case. Further, there is no affirmative evidence that the exclusive bargaining representatives at any of these locations were unable or unwilling to represent the unit employees at the time the nationwide PATCO petition was filed. With respect to the Minneapolis unit, the evidence establishes that while the local union at that facility was disbanded prior to the filing of the PATCO petition, the national union (NAGE) took affirmative action prior to such time to administer the agreement and to provide representation for the unit employees. Moreover, the record reveals that there still remain dues paying members in the unit.

I further find that the exclusive representatives at the tower at New Castle, Delaware and the combined-station-tower at Farmington, New Mexico, were defunct at the time the PATCO filed its petition in the subject case. Thus, the evidence established that the NAGE local at New Castle, which was the sole labor organization signatory to the negotiated agreement at that facility, had been disbanded and its assets had been disbursed to the membership prior to the filing of the PATCO petition. Further, there was no evidence of any affirmative action by the NAGE at the national level to assume the responsibility for administering the local agreement at New Castle or to otherwise provide representation to the employees in the unit. Regarding the combined-station-tower at Farmington, the evidence revealed that the AFGE local at that facility was disbanded about eight months prior to the filing of the PATCO petition, and there was no evidence prior to filing of the PATCO petition of any effort by the local to administer the agreement. In addition, the AFGE, in September 1970, notified the local that it was being disbanded retroactive to September 1969.

10/ In my view, a policy which would permit a petitioner that seeks a broad unit, including employees in less comprehensive units covered by negotiated agreements, to present facts occurring after the filing of the petition to establish defunctness of the exclusive bargaining representatives in such units, as urged by the PATCO, would encourage dissatisfied unit members to abandon their exclusive bargaining representative, after the filing of untimely petitions encompassing their units, thereby creating unnecessary instability and uncertainty in labor relations.

In these circumstances, I find that the exclusive representatives in the units in issue were unable or unwilling to represent the employees and, were, in fact, defunct at the time of the PATCO petition herein. Accordingly, I find that the agreements allegedly covering the New Castle and Farmington units do not constitute bars to the inclusion of the employees in such units in the more comprehensive unit sought by the PATCO. 11/

(d) "Inactive"representation.

PATCO contends that the negotiated agreements between the Activity and the NAGE covering controllers at the combined-station-tower at Providence, Rhode Island and the center at Quonset, Rhode Island should not be permitted to bar the inclusion of the controllers covered by the agreement in the unit sought herein despite the fact that its petition was not timely filed as to such units within the meaning of Section 202.3(c) of the Assistant Secretary's Regulations. In this regard, the PATCO asserts that the NAGE has been inactive in such units and that the negotiated agreements which have been effective since 1967 have been effective only by virtue of automatic renewal provisions.

There is no record evidence that the NAGE was defunct at either of these locations at the time of the filing of the PATCO petition. In these circumstances, I find that the negotiated agreements at the combined-station-tower at Providence, Rhode Island, and the center at Quonset, Rhode Island, bar the inclusion of the units they cover in the unit sought by the PATCO.

(e) Termination of agreement and attempted severance.

PATCO contends that the negotiated agreement which covers the controllers and also certain teletypists at the Boston, Massachusetts center, has been terminated, and, consequently, there is no bar to an election in this unit. The evidence reveals that the NAGE and the Activity executed a negotiated agreement on January 18, 1967. The agreement provided that it was renewable annually unless there were requests for renegotiations. The evidence reveals that the agreement remained in effect and unchanged until October 5, 1970, at which time the NAGE requested renegotiations of two provisions. The Activity agreed to renegotiate and negotiations were scheduled for May 13, 1971. However, it appears that negotiations did not take place.

11/ In view of the finding of defunctness, I find the rationale in Federal Aviation Administration, Department of Transportation, A/SLMR No. 122, with respect to granting self-determination elections in units where there is a recent bargaining history, to be inapplicable in this situation.

In accordance with the PATCO's contention, I find that by virtue of the parties' conduct in agreeing to renegotiate their agreement, such agreement terminated 12/ prior to the filing of the PATCO petition and therefore, no agreement bar exists. However, as noted above, the established unit represented by the NAGE includes teletypists as well as controllers. PATCO does not seek to represent teletypists. In effect, therefore, the PATCO is seeking by its petition in this case to sever the controllers from the remaining employees in the bargaining unit. There is no evidence that the NAGE has failed to represent either the controllers or the teletypists at the Activity's Boston facility in a fair and effective manner or that the NAGE is defunct. In Federal Avaiation Administration, Department of Transportation, cited above, I indicated (at footnote 9) in a similar situation that, in accordance with the policy set forth in United States Naval Construction Battalion Center, A/SLMR No. 8, I would not permit severance from existing units in the absence of evidence that the incumbent labor organization has failed to represent the claimed employees in a fair and effective manner. Because, as noted above, there is no such evidence in the instant case with respect to the controllers at the Boston facility, I shall not sever such employees from their existing unit and shall not include them in any unit found appropriate herein.

(f) Prior vote against exclusive representation in a less comprehensive unit.

An additional bar issue raised in the subject case involves the Activity's center located at New York City, New York. The record reveals that the employees at this facility voted against exclusive representation in an election held in a station-wide unit, subsequent to the time the PATCO filed its nationwide petition. Section 202.3(a) of the Assistant Secretary's Regulations 13/ does not bar the inclusion of such employees in a broader unit, such as the unit sought by the PATCO, because the claimed unit herein is not the same unit or a subdivision of the unit in which the prior election was held. Accordingly, I find that such election does not constitute a bar to the inclusion of the employees at the New York City, New York facility in the unit sought by the PATCO. 14/

12/ Cf. National Center for Mental Health Services, Training and Research, A/SLMR No. 55

13/ Section 202.3(a) provides, in pertinent part, "...a petition will be considered timely filed provided there has been no valid election within the claimed unit within the preceding twelve (12) month period and provided further that the claimed unit is not a subdivision of a unit in which a valid election has been held within such period."

14/ See Federal Aviation Administration, Department of Transportation, cited above, and Department of Interior, Bureau of Indian Affairs, Navajo Area, Gallup, New Mexico, A/SLMR No. 99.

(g) Certification bar.

The evidence establishes that at the Activity's towers at Fairbanks, Alaska; Atlantic City, New Jersey; Buffalo, New York; and the center at Seattle, Washington, the exclusive bargaining representative involved was certified within the twelve month period immediately preceding the filing of the PATCO petition in the subject case. PATCO contends that such certifications do not bar the inclusion of the units they cover because the certification year will have expired by the time the decision in the subject case is issued by the Assistant Secretary and because they cover units which are inappropriate. As stated above, the controlling date for bar purposes when a petition seeks to include units covered by bars in a more comprehensive unit, is the date the petition is filed. In these circumstances, I shall exclude the controllers at the above-noted facilities from the unit sought by the PATCO.

(h) Remaining exclusively recognized units.

The record reveals that with respect to the remaining exclusively recognized units, as of the date of the PATCO petition herein there was no collective bargaining history--i.e., such units have not been covered by a negotiated agreement or a recently expired negotiated agreement. In Federal Aviation Administration, Department of Transportation, cited above, I stated that the appropriateness of such units could be considered without regard to prior grants of exclusive recognition upon the filing of a petition encompassing such units. Accordingly, I find that the controllers in existing controller units in which there is no evidence of a collective bargaining history, should be included in the unit sought herein without regard to their former unit status, as there is no evidence that the controllers in such units have a clear and identifiable community of interest separate and distinct from those unrepresented controllers covered by the subject petition. 15/

(i) Section 3(c) determination re Panama Canal Zone.

With respect to employees covered by the PATCO petition located in the Panama Canal Zone, the record reveals that on February 8, 1972, the Secretary of Transportation stated that, in his sole judgment, he had determined that it was in the national interest to suspend all provisions of Executive Order 11491 (except Section 22) with respect to Departmental activities in the Panama Canal Zone.

15/ None of the parties contended that the exclusive recognitions which had been in existence for more than 12 months at the time the PATCO filed its petition, and for which units there were no negotiated agreements, constituted bars to the inclusion of the employees in such units within the unit sought by the PATCO, or that these employees were entitled to self-determination elections.

Under these circumstances, and noting the provisions of Section 3(c) of the Order and the fact that no party in the subject case contested the Secretary of Transportation's determination, I shall exclude from any unit found appropriate controllers located in the Panama Canal Zone.

II. APPROPRIATE UNIT

In agreement with the PATCO, the Activity contends that the appropriate unit herein should include all controllers employed at towers, centers and combined-station-towers because such employees share a clear and identifiable community of interest and their inclusion in a single nationwide unit would promote effective dealings and efficiency of agency operations. However, contrary to the PATCO, the Activity asserts that controllers who occupy the position of Instructor at the FAA Academy at Oklahoma City, Oklahoma; Evaluation and Proficiency Development Specialist; Flow Controller; Area Specialist; Military Liaison and Security Specialist; and Planning and Procedures Specialist are managerial and/or supervisory employees within the meaning of the Order and, as such, should be excluded from the unit. The AFGE contends that a unit limited to controllers at towers, centers and combined-station-towers is inappropriate because it would exclude technicians, teletype operators, clerical employees and cartographers who share a community of interest with the controllers. Also, the AFGE and the NAGE contend that the community of interest among controllers is at the facility and Regional levels and that a nationwide unit is inappropriate. With respect to the employees which the Activity contends should be excluded as managerial and/or supervisory employees, the AFGE takes no position while the NAGE takes a position concerning only the Evaluation and Proficiency Development Specialists, who it contends should be excluded from the unit on the basis that they are supervisors within the meaning of the Order.

The Federal Aviation Administration (FAA) is engaged in providing for the safe and expeditious flow of air traffic. It is divided into 5 operating divisions, including the Air Traffic Division, the Division involved herein. The Air Traffic Division is responsible for providing technical assistance and supervision for flight service stations and international flight service stations where the FSS are employed, and for the towers, centers and combined-station-towers where the approximately 17,000 controllers sought by the PATCO are employed. The FAA operates through 12 geographic regions.

The towers, which number some 325, are located near airports and the controllers employed therein are responsible for controlling the movement of air traffic within the immediate vicinity through the use of radar and other electronic equipment and also by using visual aids. The centers, which number some 27, are located along airway routes, and the controllers employed therein are responsible for controlling the movement of air traffic between airports and over certain oceanic routes. Also, there are approximately 45 combined-station-towers, which are responsible for performing the functions of both control towers and flight service stations. In this regard, the

record reveals that the combined-station-towers are considered to be air traffic control facilities, as are the towers and the centers, and that any specialists at the facilities are considered to be controllers. The record reveals that while the controllers at the combined-station-towers spend about half their time performing flight service functions they spend the remaining portion of their time performing controller functions for which only the controllers are qualified.

The Air Traffic Division, which is headquartered in the Air Traffic Service Office in Washington, D. C., is divided into 12 Regions, each of which is headed by a Regional Division Chief. Each Division Chief is responsible for the operation of the towers, centers and combined-station-towers as well as the flight service stations in his Region. The Division Chiefs report to a Regional Director, who is responsible for all FAA programs in a particular area. Immediately beneath the Division Chiefs are the Facility Chiefs who supervise the day-to-day operations of the towers, centers and combined-station-towers. The record reveals that the Facility Chiefs have the authority to initiate personnel actions such as transfers, promotions and demotions, but that the final authority for such actions is vested at the Regional level.

The FAA's personnel, operating and labor relations policies are determined at the national level. The personnel policy is the same for all air traffic control facilities, and while the Regions have some latitude in determining such matters as work shifts, vacation scheduling, the amount of overtime and the number of employees assigned operating units, such latitude is clearly defined in detailed instructions and any differences which exist between the various facilities with respect to these matters result from the demands of local conditions. Also, the FAA has a uniform national policy for training, promoting, demoting, and terminating the employment of controllers and has national procedures and standards which controllers are required to employ in the performance of their duties.

The FAA national labor office is responsible for determining the FAA's overall labor-relations program and it provides guidelines and instructions for the labor-relations offices which exist in each Regional office. The national office aids the Regions in resolving labor problems and ensures conformity by the Regions with national policy. Further, the national office frequently participates in collective bargaining negotiations along with representatives from the Regions and facilities involved, and agreements, whether negotiated at the Regional or facility level, are subject to approval by the national office.

The work force at the air traffic control facilities consist of controllers, supervisors, managerial employees, and depending upon the size of the facility, teletype operators, clericals, flight data aides, electronic technicians, and cartographers. While the controllers share the same

supervision at the facility level with all of the foregoing categories of employees,(except the electronic technicians, who are employed in a different operating division), the record reveals that the skills, training and duties of such employees differ substantially from those of the controllers and they may become controllers only after successfully completing the controllers' training program. There is no interchange between these other categories of employees and the controllers and none of them are included in the controllers' career progression ladder, which has an entrance level of GS-5 and journeymen level of GS-12 or 13, depending upon the skills required at the particular facility. Also, the evidence establishes that none of the employees in other categories gain skills, by virtue of their duties, which will enable them to become qualified controllers. Thus, teletype operators are engaged in sending and receiving communications through the use of teletype equipment; the clerical employees are engaged in performing administrative clerical work such as typing schedules and pay slips; the flight data aides are responsible for making available to the controllers flight plan information and weather data and also perform some teletype functions; and the electronic technicians are responsible for maintaining the equipment at air traffic control facilities and flight service stations. With respect to the cartographers, the record reveals that they are employed only at centers and the largest towers. It appears that they are engaged in preparing technical charts. There is no evidence that they perform any controller functions. While some of the foregoing employees perform their duties in physical areas normally occupied by the controllers, they do not perform any of the control functions performed by the controllers.

The record establishes that all controllers have the same basic skills and are required to complete the same training program which requires a period of about two years. The area of consideration for promotions for controllers, and filling vacancies in the work force, is generally at the facility or Regional levels. However, vacancies frequently are filled by transfers between the various Regions. The evidence reveals that a controller who transfers between facilities may require from 4 to 18 months of experience before he receives a rating as a journeyman controller in all sectors at the new location, with the exact time depending on the difference in the skills required at the new and old facilities.

Based on the foregoing circumstances, and noting the foregoing discussion under item I, above, I find that a unit comprised solely of controllers at towers, centers and combined-station-towers is appropriate for the purpose of exclusive recognition. Thus, as discussed above, the record establishes that controllers possess skills which are clearly distinguishable from those of other occupational groups such as the FSS, clericals, teletype operators, electronic technicians, flight data aides, and cartographers. The record further establishes that the training, recruitment and career ladders of the controllers differ from other occupational groups employed by the Activity, and that there is little or no interchange between controllers and other occupational groups with whom they come in contact. I, therefore, find that the controllers share a clear and identifiable community of interest separate and apart from other occupational groups, and that they may constitute a separate appropriate unit.

With respect to the scope of the unit sought, the record establishes that all controllers share the same basic skills, training, functions, and responsibilities and perform essentially the same kind of work on a day-to-day basis. Moreover, there is a central training facility for all controllers and their overall training program is established at the national level. Similarly, personnel and labor relations policies for controllers are established at the national level and, while there may be certain variations in labor relations and personnel policies at the Regional and facility levels, the record establishes that such variations are subject to approval by the national office. Under these circumstances, I find that the claimed unit, as modified by the rationale set forth above, is appropriate for the purpose of exclusive recognition and that such a unit will promote effective dealings and efficiency of agency operations.16/

III. ELIGIBILITY ISSUES

(a) Instructors at the FAA Academy.

The Activity would exclude the controllers employed as instructors at the FAA Academy, located at Oklahoma City, Oklahoma, on the grounds that they are "managerial employees". In this regard, the Activity asserts that as instructors these employees can by their performance evaluations affect the employment tenure of student controllers.

The FAA Academy is involved in training and retraining certain occupational groups employed by the FAA and employs a number of instructors, including approximately 300 instructors who are engaged in training and retraining controllers. The controller-instructors are recruited from among journeymen controllers and are assigned to the Academy for periods of two years or more. They have return rights to their respective facilities but have no option to become permanent instructors, although they may extend their tours of duty as instructors for a second two-year period. The record reveals that approximately one-third of the instructors return to their controller duties at controller facilities at the expiration of their tours at the Academy. The instructors have a grade level of GS-13, and the assignment as instructor results in a promotion only in situations where the instructor involved is recruited from a facility having a journeyman level of GS-12. When instructors enter on duty at the Academy, the record reveals that they are given certain instruction courses and they receive some management training. 17/

16/ While, as contended by the NAGE and the AFGE, region-wide units may also be appropriate, I do not consider such contentions to be material as no labor organization is seeking to represent the controllers on such a basis.

17/ Candidates who do not successfully complete the training for instructors are returned to their former facilities.

In performing their duties the instuctors conduct lectures, give laboratory demonstrations and prepare written lesson plans based on the objectives to be achieved as set forth in FAA training material. They also administer examinations, which are primarily objective in nature but which require some subjective analysis. The instructors evaluate their students, and such evaluations are provided to the facility to which the student is assigned where any judgment regarding his future tenure is made.

A controller-student spends from 5 to 9 weeks at the Academy depending on whether he is a trainee or an experienced controller. The initial training of controllers takes place at the various individual facilities and the training received at the Academy is a part of the second phase of training which is completed after the student returns to the facility from the Academy. Thereafter, the facility determines if the student has passed or failed.

On the basis of the record herein, it is clear that the controller-instructors at the FAA Academy are not managerial employees. Thus, it is clear that they do not have the authority to make, or to influence effectively the making of, policy necessary to the Activity with respect to personnel, procedures, or programs. 18/ Rather, the role of the instructor is to carry out the Agency's established policy. Thus, the instructors train students in accordance with established standards and procedures. Moreover, the final determinations as to the effect of the instructor's student evaluations are made at the facility to which the students are assigned and not at the Academy. Under all the circumstances, therefore, I find that the instructors are not managerial or supervisory employees. However, in my view, the record reveals that the instructors have a community of interest which differs significantly from that of the controllers employed at various Activity facilities throughout the country. Thus, while acting as instructors at the Academy, they perform purely teaching functions and their community of interest is with other instructors rather than with employees performing normal air traffic controller functions. In this regard, it is noted that the instructors are not engaged in controlling air traffic and, while at the Academy, do not work at air traffic control facilities. In addition, the record reveals that while instructors have the option of returning to their former positions as controllers, a substantial number of them do not return to controller positions. In all the circumstances, I find that the FAA instructors do not share a clear and identifiable community of interest with the controllers in the unit I have found appropriate and, accordingly, I shall exclude them from such unit.

(b) Evaluation and Proficiency Development Specialists.

The Activity would exclude Evaluation and Proficiency Development Specialists (EPDS) as supervisory and/or managerial employees and the NAGE would exclude them as supervisors.

The Activity employs approximately 500 EPDS at centers and the largest towers. They are recruited from among journeymen controllers. The position provides for a grade level of GS-13, the same as a journeyman controller, except at those facilities in which controllers have a journeymen grade level of GS-12. The record reveals that EPDS must maintain their proficiency as controllers and they do so by working as controllers for four hours each week. The EPDS work under the supervision of an Evaluation and Proficiency Development Officer (EPDO) or some other official who is a part of the managerial staff as opposed to the line supervisory staff. An EPDO reports directly to the Operations Officer who, in turn, reports to the Deputy Chief, who is the second highest official at the facility level.

The EPDS are engaged in training and evaluating the controllers who have not reached the journeymen level of grade 12 or 13, 19/; evaluating journeymen to ensure that they maintain their proficiency; and evaluating and analyzing controller operations to determine the cause of incidents such as "near misses" by aircraft so that corrective action may be taken. In training "developmentals", the EPDS conduct classroom lectures, simulated training exercises and administer examinations. The EPDS also follow the performance of the "developmentals" once they have been assigned to the control room to see if they are progressing satisfactorily. The above-mentioned lectures and examinations which involve the EPDS are based mostly on material furnished by the FAA Academy, but generally they include some material developed by the EPDS. Examinations are administered to "developmentals" after each phase of the training program, including their return from the FAA Academy and they include objective and subjective considerations. The EPDS determine, based on the examinations and observations of the "developmental's" performance, whether the "developmental" is progressing satisfactorily, needs additional training, or should be terminated. The EPDS compile the training record which forms the basis for terminating any "developmental" who fails the training program. Although the decision to terminate a "developmental" is made by the EPDO, such decision is based on the training record and the judgment of the EPDS. Also, the EPDS are members of review boards which ultimately decide whether a "developmental" should be terminated and if the case is sufficiently documented to justify the termination. The record reveals that the judgment of the EPDS is accepted in practically all such cases.

In addition to evaluating and training employees, the EPDS evaluate and analyze incidents such as "near misses" by aircraft to ascertain whether such incidents are caused by the equipment, control procedures, or controller error. In this regard, the EPDS recommend corrective action when necessary. Also, when new policies and procedures are announced the EPDS study the effect such policies and procedures will have on their respective facilities and develop material designed to advise all controllers of the changes.

Based on the foregoing, and noting particularly the role of the EPDS in evaluating the job performances of "developmental" controllers, and in

18/ See Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135.

19/ Such controllers are called "developmentals."

effectively determining the future job status of such employees, I find that the EPDS are supervisors within the meaning of the Order. Accordingly, I shall exclude them from the unit found appropriate. 20/

(c) Flow Controllers.

The Activity employs approximately 140 controllers at the centers who are designated as Flow Controllers. Their primary function is to regulate the flow of traffic into and out of the centers as well as within their sector of the facilities so that neither their facility nor areas within their facility's sector become saturated with an overflow of traffic. These employees are expected to observe the traffic in each sector and, where there is a heavy flow of air traffic, to determine how many aircraft should be slowed down or diverted from their sectors. Such decisions are communicated to the adjoining centers after coordinating the decision with the national office.

The Flow Controllers have no supervisory authority or responsibility over other controllers and they are required to maintain their proficiency as controllers. They report to the assistant facility chief on whose staff they serve. The assistant chief is responsible for supervising the first line supervisors as well as certain other staff positions. Each flow controller has a comparable grade to the first line supervisors at the facility where he is employed, which is one grade above the journeymen controllers at such facility. The policies, standards and procedures which the Flow Controller utilizes in performing his job functions are determined at the national level, and while he initiates and develops flow control procedures for use within his facility, and between his facility and other facilities, such procedures are required to meet well defined guidelines.

On the basis of the foregoing, I find that the Flow Controllers, while highly skilled, do not have the authority to make, or to influence effectively the making of, policy. Rather, they are engaged in carrying out, within established guidelines, policy which has been established at higher levels. Accordingly, I find that the Flow Controllers are not managerial employees, and as they have a community of interest with the employees in the claimed unit, as evidenced by their common working conditions and skills, I shall include them in the unit found appropriate.

(d) Area Specialists and Planning and Procedures Specialists.

The Activity employs approximately 125 Area Specialists at the larger centers and approximately 20 Planning and Procedures Specialists at the towers. Their duties are essentially the same and primarily involve analyzing FAA policy statements, manuals and directives to determine their effect upon the operations and procedures at their respective facilities; analyzing air traffic incidents such as "near misses" and congestions in air space to determine their cause and ways of preventing future occurrences; developing and

20/ Accord, Federal Aviation Administration, Department of Transportation, cited above.

recommending modifications with respect to procedures such as approach and departure patterns, jet departure procedures, climb corridors and coded departure procedures in order to ensure that such procedures meet the national policy and that they ensure safe and expeditious handling of air traffic; and developing substitute routes and procedures to be used when navigational aids are out of service. They also prepare, or direct the preparation of, all technical charts, manuals and other reference material required at their facility and prepare agreements between centers and towers on the procedures to be used in handling air traffic in the air space between the facilities. Finally, they study the air traffic within the area of their facilities to determine the need for alternate routes, preferential routings, additional or changed holding patterns and new or relocated navigational aids, and make appropriate recommendations to their facilities.

The Area Specialists and the Planning and Procedures Specialists are recruited from the ranks of the controllers, and they are required to maintain their controller proficiency ratings. They are employed at the GS-13 level, as are the journeymen controllers at the facilities where they are employed. They do not have any supervisory authority or responsibility and are considered to be staff employees. They work in the administrative area of their facilities, although periodically they visit the control floor to check on the implementation and effectiveness of changes in the operations upon which they are working. Area Specialists work under the supervision of an area officer, where the workload demands such a supervisory position, and where it does not, they report directly to the deputy facility chief who shares administrative responsibility for the facility with the chief. The Planning and Procedural Specialists work under the supervision of the tower operations officer who directs the day-to-day operation of the facility.

Based on the foregoing, I find that these employees do not have authority to make, or to influence effectively the making of, the Activity's policy. Rather, their role is that of experts who are involved in carrying out agency policy within defined guidelines. Additionally, the evidence reveals that their duties involve the application of techniques and skills derived from their experience as controllers. Accordingly, and as the record establishes that they share a community of interest with the controllers, I shall include them in the unit found appropriate.

(e) Military Liaison and Security Specialists.

The Activity employs approximately 35 controllers as military liaison and security specialists (MLSS). They are employed at centers which have a substantial amount of military traffic and work under the supervision of a military liaison and security officer who, in turn, reports to the operations officer of the center involved. The operations officer is responsible for the day-to-day operation of the center and reports to the deputy chief.

The MLSS are engaged primarily in developing technical procedures and programs for the center's role in national defense and preparedness; developing procedures for the center's control of military aircraft; developing routes of flight for meeting special military mission requirements; conducting liaison with military organizations in regard to military exercises; and briefing center personnel on special procedures necessary for the safe and efficient control of military aircraft. They work in the administrative section of the centers, but during major air defense and strategic missions they work on the control floor where they monitor the missions and coordinate them by telephone with the military command and the FAA Central Altitude Reservation Facility in Washington, D. C.

The MLSS do not have any supervisory authority or responsibility, and have the same grade level as the journeymen controllers at the facility where they are employed. While the MLSS do not normally control aircraft, an essential requirement for the performance of their duties is the knowledge of air traffic control skills, techniques and procedures. In addition, the MLSS are required to spend sufficient time working in the control room to maintain their proficiency as controllers.

Based on the foregoing, I find that the MLSS are employed as experts who are involved in carrying out agency policy and making recommendations based on their technical skill and knowledge, with respect to the role of the various controllers in the national defense effort. I further find that the MLSS do not have authority to make or effectively influence the making of, Activity policy and that, therefore, they are not managerial employees. Accordingly, and as the MLSS share a community of interest with other controllers, I shall include them in the unit found appropriate.

As found above, I conclude that the employees sought by the PATCO have a clear and identifiable community of interest and that such a unit will promote effective dealings and efficiency of agency operations. Accordingly, with the exception of those units of controllers in which the PATCO petition was filed untimely, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition under the Executive Order 11491: 21/

> All air traffic control specialists, GS-2152 series, including flow controllers, area specialists, planning and procedures specialists, and military liaison and security specialists employed at air traffic control towers, air traffic control centers and combined-station-towers; excluding GS-2152 personnel employed at flight service stations and at international flight service stations; GS-2152 series employees employed at air traffic control towers located at Tulsa, Oklahoma; Buffalo, New York; Atlantic City, New Jersey; Knoxville, Tennessee; Miami, Florida; Norfolk, Virginia; Anchorage, Alaska; Fairbanks, Alaska; Richmond, Virginia; and Roanoke, Virginia; GS-2152 series employees employed at air traffic control centers located at Washington, D.C.; Miami, Florida; Minneapolis, Minnesota; Quonset, Rhode Island; Jacksonville, Florida; Boston, Massachusetts; Fort Worth, Texas; and Seattle, Washington; GS-2152 series employees employed at combined-station-towers located at Providence, Rhode Island; and Shreveport, Louisiana; GS-2152 series employees employed in the Panama Canal Zone; teletype operators; clericals; electronic technicians; evaluation and proficiency development specialists; flight data aides; cartographers; GS-2152 series air traffic control specialists serving as instructors at the FAA Academy; GS-2152 series air traffic control specialists employed at the National Aviation Experimental Center in Atlantic City, New Jersey; evaluation and proficiency development officers; facility chiefs; deputy chiefs; assistant chiefs; team supervisors; area officers; military security and liaison officers; data system officers; assistant data system officers; operations officers; planning officers; employees engaged in Federal personnel work in other than a purely clerical capacity; other management officials and supervisors, and guards as defined in the Order.

21/ The parties stipulated and the record establishes that employees who occupy the position of facility chiefs, deputy chiefs, assistant chiefs, team supervisors, area officers, employee proficiency and development officers, military and security liaison officers, data system officers, assistant data system officers, operations officers and planning officers, are supervisors or "managerial employees". I shall, therefore, exclude them 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 they desire to be represented for the purpose of exclusive recognition by the Professional Air Traffic Controllers Organization, affiliated with Marine Engineers Beneficial Association, AFL-CIO; the American Federation of Government Employees, AFL-CIO; the Federal Aviation Science and Technological Association, National Association of Government Employees; or none.

Dated, Washington, D.C.
July 20, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

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

ARMY AND AIR FORCE EXCHANGE SERVICE,
FORT BLISS AREA EXCHANGE,
FORT BLISS, TEXAS
A/SLMR No. 174

This case arose as the result of a representation petition filed by the National Association of Government Employees, Local R14-22 (NAGE) seeking an election in a unit of all Fort Bliss Post Exchange employees employed by the Fort Bliss (Area) Exchange. The Activity, the Fort Bliss Area Exchange, contended that an appropriate unit should include employees of the Activity's installation at the White Sands Missile Range Exchange, New Mexico (WSMRE) as well as those additional employees of the Fort Bliss Area Exchange at Fort Bliss, Texas, William Beaumont General Hospital at Fort Bliss; MacGregor Range, New Mexico; Dona Ana Range, New Mexico; Oro Grande Range, New Mexico; and Stallion Range, New Mexico.

Prior to September 25, 1971, the WSMRE had the same status as the Fort Bliss Post Exchange, being one of nine autonomous Exchanges in the Southwest Exchange Region of the Army and Air Force Exchange Service. On September 25, 1971, pursuant to a consolidation of operations, WSMRE was relegated to the status of a satellite activity of the newly named Fort Bliss Area Exchange and is now headed by a Resident Manager who reports to the General Manager of the Fort Bliss Area Exchange. The General Manager is responsible for the Activity's overall operation and has ultimate authority over WSMRE in all matters pertaining to employee hiring, discipline, termination and grievances. In addition, other functions performed previously by the WSMRE have been abolished and are performed by the Fort Bliss Area Exchange.

The Assistant Secretary found that on the basis of the record before him he was unable to make a determination as to the appropriateness of the unit sought by the NAGE. While the record reflected that the General Manager at the Fort Bliss Area Exchange has ultimate responsibility for the Activity's overall operation, it did not reflect the degree of responsibility or of day-to-day authority exercised by the Resident Manager at WSMRE over operations and over personnel at WSMRE. In addition, the record did not reflect how many employees from Fort Bliss and WSMRE are employed at Dona Ana Range (a seasonal operation), or who exercised control over them; nor did the record show how these employees and the employees at the other named locations were integrated into the

Fort Bliss Area Exchange and whether there was evidence of transfer, interchange, or job contact among employees at these installations and WSMRE or Fort Bliss proper.

Accordingly, the Assistant Secretary remanded the case to the appropriate Regional Administrator to secure additional evidence in accordance with his decision.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ARMY AND AIR FORCE EXCHANGE SERVICE,
FORT BLISS AREA EXCHANGE,
FORT BLISS, TEXAS 1/

Activity

and

Case No. 63-2903(RO)

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R14-22

Petitioner

DECISION AND REMAND

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Royce E. 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 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 Association of Government Employees, Local R14-22, herein called NAGE, seeks an election in a unit of all Fort Bliss Post Exchange employees employed by the Fort Bliss Exchange; excluding all management officials, professionals, employees engaged in Federal personnel work in other than a purely clerical capacity, supervisors and guards as defined in Executive Order 11491.

The Activity contends the appropriate unit should include the employees of the Activity's installation at White Sands Missile Range Exchange (located in New Mexico), herein called WSMRE, on the grounds that the exclusion of the WSMRE, an installation which became part of the Fort Bliss Area Exchange pursuant to a consolidation of operations, leaves a substantial number of the Activity's employees without representation

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

and would not promote effective dealings and efficiency of agency operations. The Activity also contends the NAGE's proposed unit is based solely upon the extent of union organization. It asserts that an appropriate unit would be one that includes all regular full-time and regular part-time HPP (Hourly Pay Plan) and CPP (Commission Pay Plan) employees, including off-duty military personnel in either of the foregoing categories, employed by the Fort Bliss Area Exchange at Fort Bliss, Texas, MacGregor Range, Dona Ana Range, Oro Grande Range, William Beaumont General Hospital, White Sands Missile Range and Stallion Range.2/

The record reveals that prior to September 25, 1971, the WSMRE had the same status as the Fort Bliss Post Exchange - i.e., one of the nine autonomous Exchanges in the Southwest Exchange Region. The latter Exchange Region is one of eight Exchange Regions in the Army and Air Force Exchange Service (AAFES). In the past, both the WSMRE and the Fort Bliss Post Exchange had essentially identical management structures, each headed by a General Manager who reported to the Chief of the Southwest Exchange Region who, in turn, reported to the Commander of the AAFES. The record reveals that the NAGE holds exclusive recognition in a unit of employees employed by the Southwest Exchange Region at Fort Bliss, Texas and Tucson, Arizona.

Effective September 25, 1971, a consolidation of operations took place in which the WSMRE was relegated to the status of a satellite activity of the Fort Bliss Post Exchange whose name, in order to reflect the WSMRE addition,3/ was changed to the Fort Bliss Area Exchange. The WSMRE is headed now by a Resident Manager (USP-11 grade level)4/ who reports directly to the General Manager (USP-14 grade level) of the Fort Bliss Area Exchange. The record reveals that the General Manager is responsible for the Activity's overall operation and has ultimate authority over WSMRE in all matters pertaining to employee hiring, discipline, termination and grievances.

The record reveals that prior to the consolidation of September 25, 1971, the WSMRE had its own Accounting Office headed by an Accounting Manager, a Personnel Office headed by a Personnel Clerk and a Retail Operations Branch headed by a Retail Operations Manager. As a result of the consolidation, these functions and supervisory positions have been abolished and, at present, the accounting function at the WSMRE is handled by the Activity's accounting office. Further, all personnel records are maintained by the Southwest Exchange Region at Fort Bliss and the overall retail operations at the Activity are under a Retail Operations Manager (USP-12) who is located at the Fort Bliss Area Exchange. In this latter regard, the record shows that the Retail Operations Manager visits WSMRE about twice a week. However, with the exception of maintenance crews who perform maintenance and renovation work at all of the Activity's duty stations, the record reveals little, if any, evidence concerning temporary transfer, interchange, job contact or integration of work processes between Fort Bliss and WSMRE nonsupervisory employees.5/ The record does reflect that WSMRE employees are in the same wage survey area and competitive bidding area for purposes of promotion or reduction-in-force as other Fort Bliss Area Exchange personnel.

On the basis of the record before me, I am unable to make a determination as to the appropriateness of the unit sought by the NAGE. In this connection, while the record shows that the General Manager at the Fort Bliss Area Exchange has ultimate responsibility for the Activity's operation, the record does not reflect the degree of responsibility or of effective day-to-day authority exercised by the Resident Manager at WSMRE.6/ More specifically, the record is unclear as to the degree of autonomy retained by the Resident Manager at WSMRE, with respect to the day-to-day operations of WSMRE and with respect to interviewing, hiring, firing, disciplining, promoting and evaluating employees. Moreover, the record does not adequately reflect how many employees from Fort Bliss and WSMRE are employed at Dona Ana Range, or who exercises control over them. Nor does the record show how these employees or the employees stationed at William Beaumont General Hospital, MacGregor Range, Oro Grande Range or Stallion Range are integrated into the Fort Bliss Area Exchange, and whether there is any

2/ The record reveals that Fort Bliss is located near El Paso, Texas as is the William Beaumont General Hospital, which is a tenant facility on the Fort Bliss grounds employing six individuals in a retail and food operation. MacGregor Range, New Mexico, a year-round installation employing four individuals, is located about twenty-five miles northeast of Fort Bliss. Dona Ana Range, New Mexico, a seasonal operation (summer only) is located about fifteen miles west of MacGregor Range. Oro Grande Range, New Mexico, is a year-round installation staffed by a single employee detailed from MacGregor Range, and is located twenty miles north of MacGregor Range. White Sands Missile Range, New Mexico, is located forty-five miles north of Fort Bliss. Stallion Range, New Mexico, a year-round installation staffed by three employees, is located approximately 130 miles north of the WSMRE. With respect to the Stallion Range installation, the Activity indicated both at the close of the hearing and in its brief, that due to the geographic distance between Stallion Range and WSMRE, it would be willing to exclude the Stallion Range from the unit.

3/ The record indicates that Stallion Range was a satellite installation of the WSMRE which, thus, came under the Fort Bliss Area Exchange as a result of the consolidation.

4/ The record reveals that USP-11 is equivalent to GS-11.

5/ The only evidence of interchange among any of the other installations is that Dona Ana Range is staffed during the summer months by employees from Fort Bliss and WSMRE.

6/ Cf. Army and Air Force Exchange Service, MacDill Air Force Base Consolidated Exchange, A/SLMR No. 29.

evidence of transfer, interchange or job contact among employees duty stationed at these installations as well as those at WSMRE or Fort Bliss proper.

Accordingly, in my view, the record does not provide an adequate basis upon which I can decide whether the petitioned for employees at Fort Bliss share a clear and identifiable community of interest separate and apart from other employees of the Activity, and whether such a unit will promote effective dealings and efficiency of agency operations. Therefore, I shall remand the subject case to the appropriate Regional Administrator for the purpose of reopening the record in order to secure additional evidence as discussed above.

ORDER

IT IS HEREBY ORDERED that the subject case be, and it hereby is, remanded to the appropriate Regional Administrator.

Dated, Washington, D.C.
July 27, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

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

UNITED STATES CIVIL SERVICE
COMMISSION, SAN FRANCISCO REGION
A/SLMR No. 175

The Petitioner, American Federation of Government Employees, Local 3270, AFL-CIO, sought an election in a unit composed of all investigators and investigative aides employed in the Activity's Investigations Division. The Activity contested the appropriateness of the unit contending that the investigators and investigative aides did not possess a clear and identifiable community of interest apart from its other employees.

The Assistant Secretary determined that the proposed unit was not appropriate for the purpose of exclusive recognition. He noted that the investigators and investigative aides had skills which were similar to those possessed by other employees of the Activity and that if they wished to advance beyond the journeyman level, they were required to be skilled in performing functions which were the primary responsibility of other employees of the Activity. He noted also that the investigators and investigative aides spent a significant amount of their time performing non-investigative functions ordinarily performed by other regional employees. Under these circumstances, and noting that the claimed employees shared the same fringe benefits and were subject to the same personnel policies and procedures, and that the authority for conducting labor relations for all regional employees was at the regional level, the Assistant Secretary concluded that the employees sought by the AFGE did not constitute an appropriate unit. He noted also that such a unit would not promote effective dealings and efficiency of agency operations. Accordingly, he ordered that the petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES CIVIL SERVICE COMMISSION,
SAN FRANCISCO REGION 1/

Activity

and

Case No. 70-2417

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3270, AFL-CIO

Petitioner

DECISION AND ORDER

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

Upon the entire record, including briefs filed by both parties, the Assistant Secretary finds:

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

2. The American Federation of Government Employees, Local 3270, AFL-CIO, herein called AFGE, seeks a unit consisting of all investigators and investigative aides in Alaska, Arizona, California, Hawaii, Idaho, Nevada, Oregon and Washington, serviced by the Investigations Division of the Civil Service Commission, San Francisco Region, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, managers, guards and supervisors as defined in the Order. The Activity contends that a unit limited to investigators and investigative aides is inappropriate as such employees do not possess a separate and distinct community of interest apart from its other employees, and also that the unit, if granted, will not promote effective dealings and efficiency of agency operations. It further contends that the appropriate unit should include only those employees employed in California, Nevada, Arizona and the Pacific area, inasmuch as all employees in the other states sought by the AFGE in this matter have been removed from the jurisdiction of the San Francisco Region.2/

The CSC is the central personnel agency for the Executive Branch of the Federal Government and, as such, it provides personnel policies, standards and regulations for the Executive Branch. It also provides personnel services such as recruiting, testing, employee examining and investigative services for determining the suitability of persons for Federal employment and has reviewing authority in cases where persons are deemed unsuitable for employment by the employing agency for security reasons. Further, it serves as the appeals tribunal for grievances filed by certain employees against the Executive Branch and provides benefits such as life and medical insurance and income retirement for Federal employees. The CSC is divided into a central office, which is primarily responsible for policy matters, and ten regions including the San Francisco Region (the Region involved herein) which are responsible for operations functions. Each region is divided into a regional office, where most administrative and decision-making functions are conducted, and area and local offices, which are responsible for field operations in particular areas of the region.

The Activity's jurisdiction (subsequent to the above noted reorganization) encompasses the states of California, Nevada and Arizona, as well as the Pacific area, including Hawaii, and employs approximately 500 employees. It is under the administration of a Regional Director and Deputy Director, who are responsible for all of the Activity's CSC programs. Immediately beneath the Regional Director's office are six offices, namely Appeals Examining, Labor-Management Relations, Budget and Accounting, Equal Employment Opportunity, Training Center, and Administrative; and four divisions, namely, Personnel Management and Evaluation, Staffing, Intergovernmental Personnel Programs and Investigations.3/ Each of the above-named offices and divisions is responsible for administering a particular part of the Activity's program and each is under the supervision of a chief who is responsible for making day-to-day operating decisions and who reports to the Regional Director and his immediate staff. The Activity has eight area offices and two local offices, each of which is under an office manager who is under the overall supervision of the Regional Director. However, the record reveals that the office managers report to the respective administrative office and division chiefs for functional guidance and technical supervision. Generally, the managers are responsible for the administrative

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

2/ The evidence revealed that based on a reorganization plan, which was scheduled to be placed in effect on January 9, 1972, the states of Alaska, Idaho, Washington and Oregon apparently have been removed from the Activity's Investigations Division and placed under the jurisdiction of the Seattle Region, which had been responsible for all other Civil Service Commission (CSC) functions in those States prior to the reorganization.

3/ The latter division employs the investigators and investigative aides sought by the AFGE in this matter.

as well as the operations functions within the geographic area covered by their respective offices.

The Investigations Division is responsible for conducting personnel investigations to determine whether employees and applicants are suitable for Federal employment and employment by certain Federal contractors.4/ It is divided into two functional sections; investigations, where the approximately 114 investigators and 8 to 10 investigative aides are employed, which is responsible primarily for gathering evidence on the suitability of persons for employment; and the rating section, where approximately 10 rating examiners and an unspecified number of investigative aides are employed, which is responsible primarily for determining whether persons seeking employment meet the established criteria. Also, the Investigations Division employs approximately 40 clericals, most of whom apparently work in the rating section.

The Activity's investigative process begins with a national agency check which involves a review of the intelligence files of various governmental bodies such as the Federal Bureau of Investigation, House Committe on Internal Security, State Department, Department of Defense, state and local law enforcement agencies, and inquiries to former employers, schools, associates and stated references. The national agency check is effectuated through physical record searches or written correspondence, and is conducted by clerical employees in either the Activity's rating section or in the CSC National Office, depending upon where the matter originates.5/ After the national agency check is performed, the matter is assigned to a rating examiner who determines, in cases which have not been designated by the employing agency as sensitive, whether further inquiries are needed. If the examiner determines that no further inquiries are required, the investigation is considered closed and the file is forwarded to the agency which sought the investigation. If the examiner finds issues which require further inquiries, the case is assigned to an investigator in the investigations section who then conducts an exhaustive investigation. In all cases involving positions designated by the employing agency as sensitive, a full field investigation, which includes a national agency check and personal interviews by investigators, is conducted.6/ The results of national agency checks and full field investigations are reviewed by suitability rating examiners to determine whether further inquiry is warranted and if the subject is suitable for Federal employment. Once the investigation is completed, the file is returned to the

4/ Personnel investigations may also be concerned with determining whether employees meet the established criteria for specific positions.

5/ The Activity operates one of the CSC's three National Agency Check and Inquiry Centers and, as such, it performs national agency checks for three CSC regions.

6/ Approximately 90 percent of all investigations are handled through national agency checks and do not require interviews.

agency which sought the investigation.7/ During investigations, the investigative aides in the investigations section perform record searches, review files and otherwise aid and assist the investigators. The aides in the rating section separate investigation files on the basis of whether the files contain derogatory information and, if so, whether further inquiry is necessary.

The investigators are recruited from the Federal Register as are the Activity's other employees. They enter on duty as investigative aides with a grade level of GS-5 and after one year of employment they are either dismissed or promoted to an investigative trainee at the GS-7 level. If trainees perform satisfactorily, they are promoted to investigators with a starting grade level of GS-9 and a journeyman grade level of GS-11.

While investigators and investigative aides are responsible primarily for conducting investigations in the investigative section, they spend a significant portion of their work time performing duties in other programs of the Activity. Thus, the evidence reveals that investigators and their aides spend considerable time working in the rating section where the investigators work as rating examiners and their aides perform the same duties as the clericals and aides assigned permanently to that section. Investigators in the area offices are required to make a substantial number of ratings on the suitability of applicants for Federal employment, a function which normally is performed by personnel management specialists. The evidence also reveals that there are from two to five investigators serving as suitability rating examiners at all times, the exact number depending upon work requirements, and that at least forty investigators have served in this capacity during the past three years for a period of about 60 days each. Further, investigators are responsible for investigating drug abuses by Federal employees as part of the Activity's medical program, and during such investigations they are supervised by the Activity's medical officer. Additionally, investigators frequently work in the Staffing Branch of the Personnel Management Division as recruiters of new employees and are detailed occasionally to the Regional Training Center where they devise and conduct training programs for Federal and state employees. Also, a number of investigators have taken voluntary assignments to serve as appeals hearing officers in cases before the Activity's Appeal Office and Equal Employment Opportunity Office, where they receive experience in holding hearings and decision writing.

7/ Some of the Activity's investigations involve cases which require investigations in more than one region. In such cases, the investigator forwards his report to the national transcription center in Denver, Colorado, where it is transcribed and then transferred to the National Office, where reports from the different regions are compiled and a decision rendered as to the suitability of the subject under investigation for Federal employment. Normally, the Activity's rating section does not become involved in such cases.

The record reveals that the investigators and investigative aides are subject to the same personnel policies and practices as the Activity's other employees and that such employee policies and practices are established at either the National or Activity-wide level. All authority to hire, fire, and discipline employees is exercised either by the Regional Director or those designated by him to exercise such authority. Moreover, all of the Activity's employees have the same promotion plan and the record reveals that there are promotional opportunities for investigators outside the Investigations Division.8/ Under the promotion plan, investigators may be promoted on the basis of their performance as investigators to the level of GS-11. However, for the promotions beyond GS-11, the evidence establishes that investigators are required to have experience in performing duties in areas other than those normally required of an investigator.9/ Also, the record reveals that investigators are often detailed to perform work outside the Investigations Division because of fluctuations in the workload of the various Activity programs and that there have been permanent transfers of investigators from the investigations section to other offices and divisions of the Activity.

Based on the foregoing, I find that the investigators and investigative aides sought by the AFGE do not possess a clear and identifiable community of interest separate and apart from other employees of the Activity. Thus, as described above, the record reveals that investigators and investigative aides have skills which are similar to those possessed by other employees of the Activity, such as suitability rating examiners, and that their career advancement beyond the journeyman level depends upon their ability to perform functions in programs which are the primary responsibility of other employees of the Activity. In this regard, the evidence establishes that investigators and investigative aides spend a significant amount of their time performing non-investigative functions ordinarily performed by other regional employees. Under these circumstances, and noting also that the claimed employees and other employees of the Activity share the same fringe benefits, are subject to the same personnel policies and procedures, and that the authority for conducting labor relations for all regional employees is at the regional level, I find that the unit petitioned for is not appropriate for the purpose of exclusive recognition. Moreover, I find that a regional unit limited to investigators and investigative aides would not promote effective dealings and efficiency of agency operations. Accordingly, I shall dismiss the petition herein.

8/ Promotional opportunities for positions above the GS-5 level exist on an Activity-wide basis.

9/ The record reveals that in order for an investigator to be promoted to GS-12, he must spend at least 25 percent of his time performing non-investigative work.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 70-2417 be, and it hereby is, dismissed.

Dated, Washington, D. C.
July 28, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

July 28, 1972

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

GENERAL SERVICES ADMINISTRATION,
REGION 7
A/SLMR No. 176

The subject case involves a representation petition filed by Local Union 469, American Postal Workers Union, AFL-CIO (APWU) for a unit of all Public Building Service (PBS) Wage Board employees and General Schedule telephone switchboard operators employed by the General Services Administration (GSA), in Beaumont and Port Arthur, Texas. The Activity contended that the proposed unit was inappropriate because recognition of such a small fragmentized unit would not promote effective dealings and efficiency of agency operations.

The Assistant Secretary concluded that the unit sought was inappropriate. He noted that employees in the petitioned unit had the same job qualifications and the same overall supervision as other PBS employees not included in the claimed unit and that they were subject to the same personnel policies and regulations administered through a centralized personnel office as other PBS and GSA employees working in the same region. The evidence established also that considerable interchange and transfer of employees between the various program services of GSA occurred on a regular basis.

Under the foregoing circumstances, the Assistant Secretary found that the employees in the claimed unit did not possess a clear and identifiable community of interest and that the establishment of such a unit would not promote effective dealings and efficiency of agency operations. Accordingly, he ordered that the petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,
REGION 7 1/

Activity

and

Case No. 63-3231 (RO)

LOCAL UNION 469,
AMERICAN POSTAL WORKERS UNION,
AFL-CIO

Petitioner

DECISION AND ORDER

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

Upon the entire record in this case, 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, Local Union 469, American Postal Workers Union, AFL-CIO, herein called APWU, seeks an election in a unit of all full-time Public Building Service Wage Board employees and General Schedule telephone switchboard operators employed by General Services Administration in Beaumont and Port Arthur, Texas, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity,

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

guards (Federal Protective Officers) and supervisors as defined in Executive Order 11491, and professional employees. 2/

The Activity contends that the proposed unit is inappropriate because recognition of such a small fragmented unit would be inconsistent with the general practices of the General Services Administration and would not foster effective dealings and efficiency of agency operations.

The General Services Administration, herein called GSA, is headquartered in Washington, D. C. and has ten regional offices, each under a Regional Administrator. Fort Worth, Texas, is the headquarters for Region 7 which encompasses the States of Arkansas, Louisiana, New Mexico, Oklahoma and Texas. Some 3200 people are employed by Region 7 which includes 6 area offices and approximately 88 additional field locations.

One of the five program services utilized by GSA to carry out its mission is the Public Buildings Service, herein called PBS. The PBS in Region 7 is under the direction and supervision of a Regional Director. Its mission is to provide and maintain office space and related work areas for Federal agencies. There are three Divisions of PBS located at the headquarters in Fort Worth; namely, the Design and Construction Division, the Buildings Management Division and the Space Management Division. These divisions are supervised by Division Chiefs who are directly under the Regional Director. Below the Division Chiefs there are additional levels of supervision over components of the three divisions. Under the Regional Director, in addition to the Division Chiefs, are six Area Managers who are in charge of the particular area to which they are assigned. 3/ The area offices are designated by number (i.e., Area 1, Area 2, etc.) and the Area Managers report directly to the Regional Director. Also, as noted above, there are approximately 88 field locations throughout the Region with each location included under an area office. While the employees in a field location are under the day-to-day supervision of a Building Manager, all such employees are under the overall supervision of the Buildings Management Division. The record indicates that the field locations in Beaumont and Port Arthur, covered by the petition herein, come within Area 2 and constitute two of some 16 such locations within that area. Approximately 20 employees are employed at the Beaumont and Port Arthur locations.

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

3/ The record indicates that there are some 1600 PBS employees employed throughout Region 7.

The evidence establishes that the employees of the various field locations throughout the Region must meet the same job qualifications. It further reveals that all employees of the Region are subject to common personnel policies and regulations and that all employees may bid for other positions on a Region-wide basis. 4/ Testimony indicates also that considerable interchange and transfer of employees between the various program services of GSA occurs on a regular basis.

Based on the foregoing, and noting particularly that the employees in the petitioned unit have the same job qualifications and the same overall supervision as other PBS employees not included in such unit, are engaged in a common overall mission with other PBS employees in the area and throughout Region 7, and are subject to the same personnel policies and regulations administered through a centralized personnel office as other PBS and GSA Region 7 employees, I find that the employees in the petitioned for unit do not possess a clear and identifiable community of interest separate and apart from other PBS employees in the various field locations throughout Region 7, including particularly those additional employees in field locations encompassed by Area 2. Moreover, the establishment of a unit which includes some, but not all, employees who share a community of interest would not, in my view, promote effective dealings and efficiency of agency operations. Accordingly, I shall dismiss the petition herein.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 63-3231 (RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
July 28, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

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4/ The record indicates that only jobs classified as GS-7 or WG-9 and above are posted on a Region-Wide basis. Jobs classified below these grade levels are posted locally within a commuting area. However, employees outside of the commuting area may, at their option, bid for these jobs.

July 28, 1972

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

DEPARTMENT OF THE ARMY,
MILITARY OCEAN TERMINAL,
BAYONNE, NEW JERSEY
A/SLMR No. 177

The subject case involved a hearing on objections to an election which were filed by the Intervenor, National Federation of Federal Employees, Local 1550 (NFFE), to an election between it and the Petitioner, American Federation of Government Employees, AFL-CIO, Local 2855 (AFGE). The objections concerned a leaflet distributed by the AFGE prior to the election containing alleged misrepresentations.

Upon review of the Hearing Examiner's Report and Recommendations and the entire record in the case, and noting the absence of exceptions, the Assistant Secretary adopted the Hearing Examiner's recommendations and found that the AFGE's misrepresentations prior to the election in this matter constituted conduct which improperly interfered with the free choice of the employees. Accordingly, the Assistant Secretary set aside the election of August 27, 1971, and directed that a second election be conducted.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,
MILITARY OCEAN TERMINAL,
BAYONNE, NEW JERSEY

Activity

and

Case No. 32-1704

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2855

Petitioner

and

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1550

Intervenor

DECISION ON OBJECTIONS
and
DIRECTION OF SECOND ELECTION

On May 19, 1972, Hearing Examiner William Naimark issued his Report and Recommendations in the above-entitled proceeding, finding that the Petitioner, American Federation of Government Employees, AFL-CIO, Local 2855, herein called AFGE, had, prior to the election in the subject case, distributed a leaflet containing statements which constituted misrepresentations or deceptions. He concluded that such conduct interfered with the free choice of the employees who had voted in the election and that the Intervenor, National Federation of Federal Employees, Local 1550, herein called NFFE, did not have a reasonable opportunity to reply before the election. In these circumstances, the Hearing Examiner recommended that the election held on August 27, 1971, be set aside and a second election be directed.

The Assistant Secretary has reviewed the rulings of the Hearing Examiner made at the hearing and finds that no prejudicial error was

committed. The rulings are hereby affirmed. 1/ Upon consideration of the Hearing Examiner's Report and Recommendations, the entire record in this case, and noting particularly that no exceptions were filed to the Hearing Examiner's Report and Recommendations, I hereby adopt the findings, conclusions, and recommendations of the Hearing Examiner. Accordingly, the election conducted on August 27, 1971, is hereby set aside and a second election will be conducted as directed below.

DIRECTION OF SECOND ELECTION

IT IS HEREBY DIRECTED that a second election be conducted as early as possible, but not later than 60 days from the date below, in the unit set forth in the Decision, Order and Direction of Election issued on July 16, 1971. 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 quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

Dated, Washington, D.C.
July 28, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

1/ The Hearing Examiner properly denied the NFFE's motion to exclude the AFGE from participating in the hearing on the ground that the latter was not a legitimate labor organization at the time of the election in this matter. Section 202.2(g) of the Assistant Secretary's Regulations provides that any party challenging the status of a labor organization must file its challenge and evidence to support the challenge with the Area Administrator within 10 days after the initial date of posting of the notice of petition. I find that the NFFE's attempt at the hearing to challenge the AFGE's labor organization status was untimely under the above-cited section of the Assistant Secretary's Regulations, as such a matter should have been raised with the Area Administrator during the prescribed 10-day posting period. The Hearing Examiner also properly refused to adduce evidence with respect to the AFGE's contention that the NFFE did not properly serve copies of its objections pursuant to Section 202.20(a) of the Assistant Secretary's Regulations, as that matter was outside the scope of the hearing in this case.

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF HEARING EXAMINERS
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
WASHINGTON, D. C.

DEPARTMENT OF THE ARMY
MILITARY OCEAN TERMINAL
BAYONNE, NEW JERSEY

Activity

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2855 — CASE NO. 32-1704

Petitioner

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1550

Intervenor

ERRATA

The undersigned Hearing Examiner having issued his Report and Recommendation (hereincalled the Report) in this case on May 19, 1972, and

The said Report having incorrectly set forth certain dates which require correction,

IT IS HEREBY ORDERED that the following changes be and they hereby are made in the said Report as follows:

1. The date March 25, 1971 in the first sentence of the third paragraph on page seven of the Report is hereby striken and the date August 26, 1971 is substituted therefor;

2. The dates March 24 and 25, 1971 in the second sentence of the third paragraph on page seven of the Report are hereby striken and the dates August 25 and 26, 1971 are substituted therefor;

3. The dates March 24 and 25, 1971 in the last sentence of the third paragraph on page seven of the Report are hereby striken and the dates August 25 and 26, 1971 are substituted therefor; and

4. The date March 25, 1971 in the second sentence of the fourth paragraph on page seven of the Report is hereby striken and the date August 26, 1971 is substituted therefor.

Dated at Washington, D. C.,
MAY 25, 1972

William Naimark
WILLIAM NAIMARK
HEARING EXAMINER

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF HEARING EXAMINERS
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
WASHINGTON, D. C.

DEPARTMENT OF THE ARMY
MILITARY OCEAN TERMINAL
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Activity

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AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2855 CASE NO. 32-1704

Petitioner

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1550

Intervenor

John G. Cutrone, Esquire
Appearing on behalf of the Activity,
16 Maldon Street,
Malverne, New York 11565

Joseph Girlando
300 Main Street, Orange, New Jersey,
07050, for the Petitioner.

Irving I. Geller, Esquire
General Counsel, National Federation
of Federal Employees, 1737 H Street,
N. W., Washington, D. C. 20006,
for the Intervenor.

BEFORE: William Naimark, Hearing Examiner

REPORT AND RECOMMENDATIONS

ON OBJECTIONS TO ELECTION

Statement

The proceeding herein arose under Executive Order 11491 (herein called the Order) pursuant to a Notice of Hearing on Objections issued on February 7, 1972, by the Regional Administrator of the United States Department of Labor, Labor-Management Services Administration, New York Region.

The issue herein concerns the sufficiency of the objections filed by the National Federation of Federal Employees, Local 1550 (herein called the Intervenor) to an election held on August 27, 1971, among a unit of employees of the Department of the Army, Military Ocean Terminal, Bayonne, New Jersey (herein called the Activity). A majority of the votes at the election were cast for American Federation of Government Employees, AFL-CIO, Local 2855 (herein called the Petitioner).

All parties were represented by counsel, or other representatives, at the hearing which was held at Bayonne, New Jersey, on March 6, 1972, before the undersigned duly designated Hearing Examiner. 1/ The parties were afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Both the Petitioner and the Intervenor filed briefs which have been duly considered by the undersigned. 2/

1/ Intervenor moved to exclude Petitioner from participating in the hearing on the ground that the latter was not a legitimate labor organization at the time of the election. This motion was denied by the Hearing Examiner.

2/ All parties were required to file briefs by April 28, 1972. A letter dated and postmarked April 27, 1972, addressed to the Assistant Secretary of Labor, was sent by Petitioner and submitted as a brief pursuant to Section 202.14 of the Rules and Regulations. The envelope containing the letter was marked for the attention of the undersigned. The cited Section 202.14 governs the filing of briefs in representation matters to the Assistant Secretary - and not the filing of briefs to the Hearing Examiner in objection to election proceedings. Nevertheless, since it was sent to the undersigned, and inasmuch as it was timely posted, I shall accept and consider the Petitioner's letter of April 27, 1972 as its brief herein.

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

Findings of Fact

A. Background

Pursuant to a Decision, Order and Direction of Election issued on July 16, 1971, a secret ballot election 3/ was conducted on August 27, 1971, in accordance with the provisions of the Order among an appropriate unit of the Activity's employees. The results of the election were as follows:

1.	Approximate number of eligible voters	710
2.	Void Ballots	11
3.	Votes cast for AFGE Local 2855	361
4.	Votes cast for NFFE Local 1550	75
5.	Votes cast against exclusive recognition . . .	6
6.	Valid votes counted	442
7.	Challenged ballots	8
8.	Valid votes counted plus challenged ballots. .	450

Challenged ballots were not sufficient in number to affect the results of the election, and a majority of the valid votes counted plus challenged ballots has been cast for AFGE, Local 2855, AFL-CIO, the Petitioner herein.

3/ Intervenor moved that the election be ruled null and void by reason of Petitioner's alleged failure to qualify as a legitimate labor organization. This motion was referred by the Hearing Examiner to the Assistant Secretary.

Thereafter, on August 31, 1971, the Intervenor filed objections to conduct affecting the results of the election. 4/ It objected specifically as follows:

1. On August 26, 1971, the day before the election, Petitioner circulated a leaflet entitled "Boycott," which falsely asserted that Intervenor's president, Peter Erceg, who is a member of the Restaurant Council and an employee, voted to raise prices in the Activity's cafeteria.

2. The Petitioner calls for a boycott of all cafeteria patronage.

The Regional Administrator issued his Report and Findings on Objections on December 3, 1971. He concluded that Objection No. 1 raised a relevant issue of fact as to the timing of the leaflet and the opportunity to reply thereto as well as a substantial question of its interpretation which may have affected the results of the election. Objection No. 2 was found to have no merit. 5/ Accordingly, a Notice of Hearing concerning Objection No. 1 was issued on February 7, 1972.

4/ Petitioner contended proper service was not made by the Intervenor under Section 202.20(a) of the Rules and Regulations since it did not receive a copy until September 10, 1971. The Regional Administrator concluded that proper and timely service was made, and any delay in receipt by Petitioner was caused by postal procedures and handling of mail by employees at the Military Ocean Terminal. At the hearing Petitioner sought to litigate the issue of proper service of the objection by the Intervenor. The Hearing Examiner refused to permit evidence relating to service since the scope of the hearing was limited to the alleged objectionable conduct set forth in Objection No. 1. A motion to dismiss the objections was referred by the Hearing Examiner to the Assistant Secretary.

5/ Exceptions to the Regional Administrator's Report were filed by the Intervenor on December 9, 1971, but were subsequently withdrawn with the approval of the Assistant Secretary.

B. Objection No. 1

The Petitioner contends it distributed a leaflet 6/ on August 25 and 26, 1971, to the employees of the Activity as part of its campaign in the election scheduled for August 27. This leaflet bore the name of the Petitioner's national organization and was entitled "Boycott!?." The pertinent portions of the distributed material, which are alleged to be objectionable, are the following:

> "In the August 18th issue of the 'Daily Bulletin' appeared what was referred to as 'Post Restaurant Council News.' The article went on to say that effective August 30th, there will be 'higher prices on items that will be sold in the cafeteria.'
>
> "Well now! AFGE thinks something like this should deserve a little better explanation than just those few words. Well here goes!
>
> "First of all, the present caterer was asked to raise his prices across the board for all items. He refused and decided to throw in the towel! He had it with the so called 'Restaurant Council.' Then, Nu-Way Vending took the contract and agreed to raise the prices and kick back a bigger take to the 'Restaurant Council.' Well AFGE was able to learn that a certain top man on the 'council' is related to top people from NU-WAY. How do you like that! -- Here's more!
>
> "One Peter Ercig is a member of this same 'Restaurant Council' and he voted to raise the prices you will be paying starting Monday. This is the same Peter Ercig who is the President of NFFE 1550 who is asking you to vote for him Friday because he claims to best represent your interests here at MOTBY.
>
> "What nerve! Anyone who can think would know that there is something wrong here."

6/ Appendix A to A/S Exhibit 1E.

The Petitioner contends that (1) the employees could easily have evaluated the contents of the literature and thus not be influenced by any misstatements; (2) the statements in the leaflet constituted "name calling" of a minor nature which do not warrant setting aside an election; and (3) there was ample time for Intervenor to reply to any comments contained in the leaflet and so correct any possible misunderstandings.

The Activity took no position as to whether the objection should be sustained and a new election directed.

Most of the relevant facts are not in dispute. Since 1966, the Military Terminal (referred to at times as MOTBY) has operated a concession cafeteria for its personnel. Present locations of the cafeteria are in Building 52 and Building 82, and there are vending machines throughout the terminal base. Control over the policies of its operation lies with the Post Restaurant Council composed of five voting members and the Post Restaurant Officer who is a non-voting member. One of the members is Peter Erceg who is President of the Intervenor. Members of the Council are appointed, and each is a civilian representing a group of employees at the terminal. The Council meets monthly, considers proposed changes in cafeteria policy, reviews financial statements, prepares budgets, and makes recommendations to the Commanding Officer. The Post Restaurant officer supervises and coordinates all concessionary activities involving vending and food operations.

The Army has devised a procedure for selecting a concessionaire and fixing the prices charged for food items. At the outset invitations are sent to prospective bidders who may wish to operate the cafeteria. Food prices are left blank, and the bidders submit proposed prices for food items in sealed envelopes. Bids are opened in the presence of the vendors, the Chairman of the Council, the Post Restaurant Officer, and a representative of the Commanding Officer. On the basis of the best offer regarding proposed prices, a recommendation is made by the Council to the Commanding Officer as to the selection of the concessionaire.

There is also a commission arrangement between the operator of the cafeteria and the Army. At least two percent of the gross sales of the concessionaire is paid by it to the Post Restaurant Fund. This money is used (1) to replace needed equipment; (2) for the Welfare Fund's recreation and social activities; and (3) to cover the five percent tax imposed on the Army for the Army-Air Force Exchange in Washington, D. C. Between 70% - 95% of the total commission is given monthly to the Welfare Fund.

In 1967, Reny Food Service was awarded the contract for the restaurant and continued to operate it until 1971. During that period the total cost of utilities charged to the concession operator was $400.00 month. Because of the rising costs of all utilities, the Post Engineer Division of the Activity raised the cost of utilities chargeable to the concessionaire to $1500.00 per month. In order to meet the increased costs, Reny was given the opportunity to raise the prices of food items which, however, would be subject to negotiation. Reny refused to continue as the concessionaire on the basis of the high utility costs, and he therefore cancelled his contract.

Thereafter, the Army sent out over 100 invitations to various firms to bid for the food concession. While three or four submitted bids, only one - NU-WAY VENDING - was willing to undertake the concession without a subsidy. On July 26, 1971, the Restaurant Council recommended NU-WAY VENDING be granted the contract on the basis of the prices it submitted. These proposed prices were an increase over those formerly charged by Reny. The Commanding Officer at MOTBY approved the contract with the new concessionaire subject to consent from Washington's Commanding Officer. Accordingly, NU-WAY took over the cafeteria and food service operations on August 30, 1971.

The Intervenor, having seen the leaflet for the first time on Thursday, March 25, 1971, disputes its being distributed before that date. Three witnesses for Petitioner, Joseph Girlando, a staff representative of AFGE, Patsy Campanello, President of Petitioner, and John DeRosa, Petitioner's Executive Vice-President, testified the circular was prepared by them and distributed Wednesday and Thursday, March 24 and 25, 1971. Further, their testimony indicated that at least 50% of the leaflets were circulated on Wednesday. This testimony stands unrebutted despite the fact that Intervenor's witnesses testified they did not see the leaflet until the following day. Moreover, I am persuaded that Petitioner's witnesses testified credibly in this regard. Accordingly, I find the leaflet was distributed on Wednesday and Thursday, March 24 and 25, 1971, to the employees of the Activity.

Intervenor's President, Peter Erceg, testified he did not know about or see the leaflet until Thursday when he was handed one by a fellow worker. Since there is no evidence to the contrary, I find that Intervenor did not see, or become familiar with, the leaflet in question until Thursday, March 25, 1971.

With respect to the statement in the leaflet that "a top man on the Council is related to top people from NU-WAY," no evidence was adduced to support such allegation. Girlando testified he was advised by several employees that James Lasardo, Post Restaurant Officer and a member of the Post Restaurant Council, was related to a top NU-WAY official. Lasardo testified he had no knowledge of any relationship between a Council member and a NU-WAY official. Accordingly, I find no support for this statement as alleged in the leaflet.

The record contains some evidence as to the origin of the statement that NU-WAY agreed to raise prices and "kick back" a larger "take" to the Restaurant Council. Both AFGE representatives, Girlando and Campanello, stated the "kick back" refers to the commission received by the Council from the concessionaire. Further, Campanello testified it was intended to connote that the Council was getting more of the commission than the Welfare Committee, and the latter was not receiving its share.

As to the statement in the leaflet that Erceg voted to raise prices in the restaurant, the Intervenor's President testified he did not participate in any discussion regarding the vendor or take any part in raising prices. To the extent that Erceg was involved in any manner concerning the increased prices of food, I find that his participation is limited to that heretofore described in respect to the procedure adopted by the Army in selecting a concessionaire and the approval by the Post Restaurant Council.

Conclusions

A. Sufficiency of the Objection

The chief issue to be determined by the undersigned is whether the misstatements contained in the leaflet distributed on August 25 and 26, 1971, are sufficient to set aside the election herein.

In arriving at this determination one is confronted at the outset with a balancing of interests. On the one hand, unions should have the right to conduct a free and vigorous campaign prior to an election. However, employees are entitled to the exercise of a free choice in selecting their representative. They are to be placed beyond the pale of undue influence which might have an impact upon the result of the election. While we are not bound by the decisional law of the private sector, note should be taken that this sector has had

considerable experience with cases involving objections to election. Some of the observations made and conclusions adopted in those cases may serve as valuable guides in evaluating the conduct of the parties involved in elections under the Order.

One of the most thorough discourses on the subject is found in Hollywood Ceramics Co., 140 NLRB 221 which sets forth desired standards of behavior in elections. In the cited case the Board declared it sought to maintain, as closely as possible, laboratory conditions for the exercise by employees of full freedom in selecting a bargaining representative. At the same time, it realized that elections should not be set aside lightly, since to do so would upset stable labor-management relations and upset plant routine with repeated elections. Nevertheless, the Board concluded that a gross misrepresentation about a material fact could well disturb laboratory conditions to the extent that votes may not reflect the uninhibited desires of the voters. Thus, where there is such a misrepresentation, or campaign trickery, which involves a substantial departure from the truth -- at a time which prevents the other party from replying effectively -- it is reasonable to infer that such conduct would have a significant impact on the election. Assuming such misrepresentation or trickery not to be de minimus, or capable of being evaluated by employees with independent knowledge of the true facts, an election following such conduct will likely be set aside.

In the subject case we are concerned with the Petitioner's leaflet which was distributed during the two days prior to the election on August 27, 1971. Essentially, there are three statements included therein which are cause for concern: (1) NU-WAY VENDING agreed to raise food prices and "kick back" a bigger take to the Restaurant Council; (2) A top man on the Restaurant Council is related to top people from NU-WAY; (3) Peter Erceg (Intervenor's President) voted to raise the food prices the employees will be paying. There is a concluding comment to the foregoing that "anyone who can think would know that there is something wrong here."

(1) Record testimony does show that the "kick back" was intended to be referable to the customary commission paid by the concessionaire (NU-WAY) to the Restaurant Council. While it is true that under an established policy money is given to the Council by the concession operator -- and thus it may be questionable whether the statement is properly labeled a misrepresentation -- there is a sufficient basis for concluding that the language is somewhat deceptive. The term "kick back" has a popular connotation which scarcely is equatable with

rectitude. It suggests underhandedness by the accused. Webster's New Collegiate Dictionary defines "kick back" as meaning, inter alia, "A return of a part of a sum received -- as of wages, commissions, fees, etc. specif. because of a confidential agreement or coercion." [Emphasis supplied] But the commission paid to the Council is accepted as a usual feature of the concession. Although it was never devised to enable the operator to obtain the concession, the leaflet implies the raise in food prices is pegged to a "deal."

In the instant case it is not clear, moreover, that employees at the terminal were fully familiar with the commission arrangement, which would dilute the effect of the term "kick back." Minutes of the Council's meetings were not made public; no handbook or guide was issued to employees explaining the arrangement; and less than 50% of the employees utilize the cafeteria daily.

By stating that NU-WAY and the Restaurant Council were parties to a kick-back arrangement, Petitioner has, in my opinion, suggested both parties were acting dishonestly. There is an odious inference to be drawn from the relationship between the concessionaire and the Council. Employees are told that prices are to be raised by the concessionaire in the cafeteria, but they are so advised this is part and parcel of the "kick back" by NU-WAY to the Council of a "bigger take." Such statements impute a lack of integrity to both parties. They suggest, and the employees may readily infer, that the Restaurant Council is not acting in their best interests. This is borne out by the testimony of Petitioner's representative Patsy Campanelli who stated that Petitioner felt the Council was getting more of a "take" than the Welfare Committee. When it is realized that Intervenor's President Erceg is a member of the Restaurant Council, and he is so mentioned in the leaflet, a reader of the leaflet by association may well taint the president of the Intervenor with wrong doing. In truth, the document takes issue with the fact that Erceg represents the best interests of the voters.

From the foregoing, I am persuaded that the "kick back" allegation could well have affected the free choice of the employees in the election. Accusations leveled at the Council would, in this instance, come home to roost at the doorstep of the Intervenor in view of the latter's president being a member of the Council. The employees would scarcely be expected to select as their bargaining representative a union whose leading official is involved in a "deal" with the employer. Such a statement may have a real enough impact on the results of the election, particularly since the employees are

entitled to assume that Petitioner, with wide representation, possesses knowledge of the subject matter. Further, I am convinced that statement is not of the nature which employees could evaluate as propaganda -- that the employees did not have independent knowledge of the arrangement to enable them to make such an evaluation. Accordingly, I find and conclude that by this particular assertion Petitioner violated the requisite election standards, and thus impaired the employees' ability to vote intelligently.

(2). With respect to the allegations in the leaflet that a top man on the Restaurant Council is related to "top people" from NU-WAY, the record reflects this statement is not true. No proof was adduced as to such alleged relationship. Girlando testified he really did not know if the statement was true, and it was based on remarks to him by several employees. At first blush this misrepresentation may appear by itself to be innocuous in nature and not of a material matter. But when read in context with the other comments in the same paragraph of the leaflet, the statement assumes a different color. In the same breath that Petitioner avers that NU-WAY agrees to raise prices in the cafeteria, and to "kick back" a bigger "take" to the Restaurant Council, it also points up a conflict of interest on the part of the Council. Since Erceg is a member of the latter, the phrase in question again ties Intervenor to a group which is engaging in underhanded activity. I am persuaded that the alleged conflict of interest is a further attempt to dishonor the Intervenor, albeit indirectly by association. It may well create doubt and uncertainty as to the leadership of the Intervenor. See Army Materiel Command, Army Tank Automotive Command, A/SLMR No. 56 (June 15, 1971). This misrepresentation, when viewed with the other statements in the leaflet discussed herein, was more than mere minor name calling -- as urged by Petitioner -- and I reject this contention. Moreover, the employees could scarcely be expected to have any knowledge of this alleged conflict of interest or be in a position to evaluate it independently. I conclude, on the basis of the foregoing, that in the posture stated, the said comment would, and did, tend to interfere with the free choice of the voting employees.

(3). The remaining questionable statement refers to Erceg's voting to raise food prices, with the reminder that this man, who claims to represent the employees' best interests, seeks their vote in the impending election.

An examination of the procedure by which a concessionaire is selected, and prices are fixed for cafeteria food, convinces the undersigned that while the charge that Erceg voted to raise prices may not

have been a complete misrepresentation, it is a half-truth. Erceg and the other Council members, it is true, voted to accept the new cafeteria operator. But the record shows that the Army allowed higher food prices to be charged by the operator to meet higher costs. The leaflet asserts that the caterer was asked to raise food prices. In fact, he was given an opportunity to do so. The statement by Petitioner that Erceg voted to raise food prices is deceptive and a type of campaign trickery which could easily have influenced employees in the election. It suggests Erceg and the Council members initiated a rise in food prices - and it fails to explain the increased prices were a result of the high costs of utilities to be borne by the concessionaire. Employees are led to believe that Intervenor favored and sponsored higher food prices in the cafeteria. Creating such an impression would, in the opinion of the undersigned, affect employees in selecting their bargaining representative. The implication is clear: Petitioner, who represents the best interests of employees, would resist any such increase, but Intervenor is responsible for the added prices to be charged for food, and would scarcely be concerned with the employees' interests. It is imperative that laboratory conditions for elections be maintained, and it is equally important for parties to observe high standards during election campaigns. Half-truths which serve to impugn another party, and to villianize a potential bargaining representative to the employees, do not meet these standards. To portray Intervenor as acting inimically to the best interest of the employees -- and particularly in regard to their pocketbooks -- could indeed have an impact upon the choice of their representative at the polls. I conclude that this particular statement, when considered with the other assertions in the leaflet described, impaired the free choice of the employees herein. Likewise, I do not believe the employees were in a position to minimize it as mere propaganda, or to obtain, the day before the election, the full version of the facts dealing with the increased food prices.

B. Opportunity of Intervenor to Reply

A consideration of whether conduct warrants setting aside an election also requires a correlative determination as to whether the other party had an opportunity to answer misleading statements. Both the private and public sectors have dealt with this issue. Where ample time is afforded to correct misrepresentations, the impact of reprehensible statements would be diminished, if not eliminated, by a counter statement. Failure to reply, in such an instance -- and particularly where the facts are available to the other party -- may justify a refusal to set aside an election. On the other hand, where a circular is distributed, or a statement made, a day or two before

the election, it has been held that there is insufficient time to reply. In Army Materiel Command, supra, the Assistant Secretary said: "I find also that by distributing the leaflet on the day before the election the NAGE was prevented from making an effective reply thereto." [Emphasis supplied] In a private sector case, Alco Standard Corp., 180 NLRB 91, a union letter containing misrepresentations came to the attention of the employer the day before the election. The employer was not faulted for failing to reply in the time remaining. An unprivileged statement made by a union two days before the election was held not to afford an employer sufficient time to reply thereto. Air-Flow Corp., 167 NLRB 679.

Applying these principles to the instant case, I conclude that Intervenor did not have sufficient time to reply to the leaflet. Since it learned of the latter on the day before the election, Intervenor could scarcely be expected to draft and distribute a reply by the following morning to over 400 voters. Moreover, Intervenor would not have been able to "clarify" the alleged relationship between a NU-WAY official and a member of the Council. Ferreting out the truth or falsity of this statement, if possible, would have taken considerable time. Therefore, I do not fault Intervenor, in this instance, for not replying to the leaflet.

In sum, the undersigned concludes the statements in the leaflet referred to in (1), (2), and (3) above -- particularly when viewed together -- were either misrepresentations or deceptions to the extent that they could have interfered with the free choice of the employees who voted in the election. It is further concluded they were made at a time when Intervenor had no opportunity to reply before the election, and the employees could not have evaluated the statements in their full light. Accordingly, it is recommended that Objection No. 1 of National Federation of Federal Employees, Local 1550, insofar as set forth above, be sustained. It is further recommended that the election held on August 27, 1971, be set aside and a second election be directed under the terms of the Order, and in accordance with the applicable Rules and Regulations of the Assistant Secretary.

WILLIAM NAIMARK
HEARING EXAMINER

Dated at Washington, D. C.
MAY 19, 1972

July 28, 1972

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

ANCHORAGE INTERNATIONAL/LAKE HOOD TOWER,
FEDERAL AVIATION ADMINISTRATION,
U.S. DEPARTMENT OF TRANSPORTATION
A/SLMR No. 178

The Petitioner, Richard Felsburg, Jr., an employee of the Activity, sought the decertification of the Intervenor, FAA Local 3028, American Federation of Government Employees, AFL-CIO, (AFGE Local 3028) as the exclusive representative of a unit of nonsupervisory air traffic control specialists at the Anchorage International/Lake Hood Tower.

The record revealed that on April 16, 1968, the predecessor of AFGE Local 3028 and the Activity signed a one-year agreement for a unit of air traffic control specialists at the Anchorage International/Lake Hood Tower, which agreement contained an automatic renewal clause. In June 1971, AFGE Local 3028 and several other AFGE locals intervened in a petition filed by the Professional Air Traffic Controllers Organization, affiliated with the Marine Engineers Beneficial Association, AFL-CIO (PATCO) for a nationwide unit of air traffic controllers.

AFGE Local 3028 contended during the instant proceeding that its intervention in PATCO's petition was designed to protect its exclusive bargaining rights at Anchorage International/Lake Hood Tower and was not for the purpose of appearing on the ballot for a nationwide unit, should such a unit be found appropriate. Moreover, it asserted that its intervention was not intended to constitute a waiver of its agreement bar with respect to its unit at the Anchorage International/Lake Hood Tower. AFGE Local 3028 asserted further that the decertification petition in the subject case was untimely, based on an agreement bar, even though conceding that the petition was filed timely in the "open period" of the parties' current negotiated agreement. In support of this position, AFGE Local 3028 argued that its agreement should be considered as still being in effect based on the fact that the PATCO nationwide petition placed all related representation matters in abeyance pending a decision by the Assistant Secretary in that case.

The Assistant Secretary found that no agreement bar existed because the decertification petition in the subject case was filed timely during an "open period." Under these circumstances, he directed an election in the unit covered by such petition. In reaching this decision, he noted that at the time of the filing of the nationwide PATCO petition, the unit employees at the Anchorage International/Lake Hood Tower were covered by a valid negotiated agreement which, at that time, constituted a bar to any election in the exclusively recognized unit.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ANCHORAGE INTERNATIONAL/LAKE HOOD TOWER,
FEDERAL AVIATION ADMINISTRATION,
U.S. DEPARTMENT OF TRANSPORTATION

Activity

and

Case No. 71-2064(Pr. 25)

RICHARD FELSBURG, JR.

Petitioner

and

FAA, LOCAL 3028, AMERICAN
FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Intervenor 1/

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Dale L. Bennett. 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 Petitioner, Richard Felsburg, Jr., an employee of the Activity, seeks the decertification of the FAA,Local 3028, American Federation of Government Employees, AFL-CIO, herein called AFGE Local 3028, as the exclusive representative of employees in a unit of:

> All nonsupervisory air traffic control specialists, GS series 2152, regardless of grade, and excluding management officials, employees engaged in Federal

1/ The Intervenor's name appears as amended at the hearing.

personnel work except in clearly clerical capacities, guards and supervisors as defined in Executive Order 11491 and teletype operators.

The Intervenor, AFGE Local 3028, claims to represent the employees covered by the petition and asserts that there is an agreement bar to an election.

2. On March 8, 1967, the Activity granted exclusive recognition to Local 2330, American Federation of Government Employees, AFL-CIO, herein called AFGE Local 2330, for a unit of "all permanently assigned non-supervisory air traffic control specialists in Anchorage International/ Lake Hood Tower," and subsequently on April 16, 1968, the parties executed a one-year agreement covering the recognized unit. 2/ The record reveals that on August 1, 1969, the FAA employee members of AFGE Local 2330 separated from that Local and became charter members of AFGE Local 3028 which has continued to represent the employees in the exclusively recognized unit.

On June 7, 1971, the Professional Air Traffic Controllers Organization, affiliated with the Marine Engineers Beneficial Association, AFL-CIO, (PATCO) filed a representation petition in Case No. 22-2603, seeking a nationwide unit of all air traffic controllers. In late June 1971, AFGE Local 3028, and several other AFGE locals intervened in Case No. 22-2603 on the bases of current exclusive recognition status in units covered by the nationwide PATCO petition and/or current negotiated agreements covering such employees. In this connection, a representative of AFGE Local 3028 testified in the instant proceeding that its intervention in Case No. 22-2603 was designed to protect its exclusive bargaining rights at the Anchorage International/Lake Hood Tower and was not for the purpose of appearing on the ballot for a nationwide unit should such a unit be found appropriate. Furthermore, AFGE Local 3028 stated that by intervening in Case No. 22-2603, it did not intend to waive any agreement bar to the nationwide PATCO petition which might exist with respect to the unit at the Anchorage International/Lake Hood Tower.

The petition for decertification in the subject case was filed on January 17, 1972, by Richard Felsburg, Jr. While the unit described in the petition for decertification is essentially the same as the recognized unit, it differs to the extent that it specifies as included within the unit General Schedule series 2152, which series covers the air traffic control specialists, and specifies also the standard exclusions contained in Section 10(b) of Executive Order 11491, as well as teletype operators. 3/ AFGE Local 3028 and the Activity assert that the proper unit description should be identical to that contained in the current negotiated agreement. In addition, AFGE Local 3028 contends that while the petition of January 17, 1972, was filed timely with respect to the "open period" of the parties' current negotiated agreement, 4/ that agreement should be considered as still being in effect based on the fact that the PATCO petition in Case No. 22-2603, placed all related representation matters in abeyance pending a decision by the Assistant Secretary in that case. The Activity states that any decision concerning the unit involved in the subject case would be inappropriate because the unit is encompassed by PATCO's petition in Case No. 22-2603, and the latter case is pending before the Assistant Secretary for decision.

Under all the circumstances of this case, I find that the decertification petition herein was filed timely and covered an appropriate unit. The record in the subject case reflects, consistent with my fact-finding in Federal Aviation Administration, Department of Transportation, A/SLMR No. 173, that on June 7, 1971, when the PATCO filed its petition for a nationwide unit in Case No. 22-2603, the employees at the Anchorage International/Lake Hood Tower facility were covered by a valid negotiated agreement which at that time constituted a bar to any election in the exclusively recognized unit. Consequently, the unit covered by the instant petition was not included in the unit found appropriate in Federal Aviation Administration, Department of Transportation, cited above.

In these circumstances, therefore, and as the instant petition for decertification was filed timely with respect to the negotiated agreement covering the exclusively recognized unit at the Activity, I shall direct that an election be conducted in the following unit which I find appropriate for the purpose of exclusive recognition under Executive Order 11491:

All air traffic control specialists, GS-2152 series, at Anchorage International/ Lake Hood Tower, excluding the facility

2/ The agreement contained an automatic renewal clause.

3/ The record indicates that, in fact, there are no teletype operators employed at the facility involved herein.

4/ Section 202.3(c) of the Assistant Secretary's Regulations provides, in effect, that when there is a signed agreement covering a unit, a petition for recognition or another petition for an election (such as a decertification petition) will be timely if filed not more than 90 days and not less than 60 days prior to the terminal date of such agreement.

chief, assistant chiefs, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order. 5/

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found to be appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the FAA, Local 3028, American Federation of Government Employees, AFL-CIO.

Dated, Washington, D.C.
July 28, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

5/ The above unit is as described in the parties' negotiated agreement with the addition of the standard exclusions set forth in Section 10(b) of the Executive Order. As the record indicates that no teletype operators are employed at Anchorage International/Lake Hood Tower, I find that such an exclusion is inappropriate. In this connection, see footnote 3, above. In addition, the parties stipulated that the facility chief and his assistant chiefs were supervisors within the meaning of the Executive Order and the record supports such stipulation. Accordingly, I find the facility chief and assistant chiefs to be supervisors and that their exclusion from the unit is warranted.

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

ARMY AND AIR FORCE EXCHANGE SERVICE,
ALTUS AIR FORCE BASE EXCHANGE
A/SLMR No. 179

In the subject case, the Petitioner, American Federation of Government Employees, AFL-CIO, Local 2586 (AFGE) sought an election in a unit consisting of employees of the Army and Air Force Exchange Service (AAFES) employed at the Altus Air Force Base Exchange in Altus, Oklahoma. The Activity contended, among other things, that such unit was inappropriate inasmuch as employees of the Altus Air Force Base Exchange did not have a community of interest distinguishable from that of employees of the two other installations, the Fort Sill and Fort Chaffee Exchanges located respectively in Oklahoma and Arkansas, which, together with the Altus Exchange, comprised the Fort Sill Consolidated Exchange.

The Assistant Secretary found that the unit sought by the AFGE was appropriate for the purpose of exclusive recognition. In this regard, he noted that the Exchange installations at Altus Air Force Base along with those at Fort Sill and Fort Chaffee recently were combined, for administrative purposes, into one operational entity called the "Fort Sill Consolidated Exchange." Although the administrative head of the overall operation is a General Manager, the evidence revealed that the Resident Manager at the Altus Exchange, except in matters involving formal employee grievances, effectively made the day-to-day management decisions. The Assistant Secretary noted in this regard that individual recommendations for employment, termination, pay increases and leave made by the Resident Manager at the Altus Exchange were almost invariably given final approval by the General Manager at the Fort Sill Exchange, and the Resident Manager had the authority to review performance evaluations and disciplinary actions by the various supervisors at the Altus facility. While the record revealed that on occasion there were some transfers and temporary interchange of Fort Sill Exchange employees, the number of such transfers and the degree of such interchange appeared to be minimal.

Based on the foregoing circumstances and noting the fact that the Fort Sill Exchange is located approximately 56 miles from the Altus Exchange and about 289 miles from the Fort Chaffee Exchange, the Assistant Secretary found that the unit comprising only the employees of the Altus Air Force Base Exchange was appropriate. Accordingly, he directed that an election be conducted in the unit petitioned for by the AFGE.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ARMY AND AIR FORCE EXCHANGE SERVICE, ALTUS AIR FORCE BASE EXCHANGE 1/

Activity

and

Case No. 63-2947(RO)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2586

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer James J. Lemming. 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 parties' briefs, the Assistant Secretary finds:

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

2. The Petitioner, American Federation of Government Employees, AFL-CIO, Local 2586, herein called AFGE, seeks an election in a unit of all regular full-time and regular part-time hourly pay plan and commission pay plan employees, including off duty military personnel in either of these categories, employed by the Altus Air Force Base Exchange, Altus, Oklahoma, but excluding temporary full-time and part-time employees, casual and on-call employees, managerial executives, employees engaged in Federal personnel work other than a purely clerical capacity, and supervisors and guards. 2/

The Activity contends that the unit sought, limited to the Altus Air Force Base Exchange, is inappropriate in that an appropriate unit must include, in addition to employees of the Altus Air Force Base Exchange, employees of the Fort Sill Consolidated Exchange located at Fort Sill, Oklahoma, and those of the Fort Chaffee Base Exchange in Arkansas. Noting the recent consolidation of these three facilities, the Activity argues that the Exchange employees of Altus Air Force Base do not enjoy a community of interest which is distinguishable from that of employees at Fort Sill and Fort Chaffee. The Activity contends that the AFGE petition in the subject case is based solely upon the extent to which the employees in the proposed unit have been organized and such a unit would not promote effective dealings between Activity management and the AFGE, nor could it reasonably be expected to contribute to the efficiency of the operations of the Fort Sill Consolidated Exchange.

The Altus Air Force Base Exchange is one of many installations operated all over the world by the Army and Air Force Exchange Service, herein called the AAFES, whose function is providing military personnel and other authorized patrons with certain merchandise and services. Under the integrated management concept of exchange operations recently adopted by the AAFES, the Exchange facilities located at Fort Sill, Altus Air Force Base, and Fort Chaffee were consolidated for administrative purposes sometime during the middle of 1970 and now form the Fort Sill Consolidated Exchange which is under the administrative management of a General Manager.

The petitioned for unit consists of 65 employees stationed at Altus Air Force Base, herein called Altus, which is located approximately 56 miles from Fort Sill and approximately 344 miles from Fort Chaffee. 3/ Of these, 58 employees are classified as "regular" and 7 employees are classified as "temporary." 4/ The Altus Exchange operates two retail stores, a cafeteria, a service station, a snack bar and various concessions such as a beauty parlor, a dry cleaning outlet, etc. Under

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

2/ The claimed unit appears as amended at the hearing.

3/ Fort Sill is located approximately 289 miles from Fort Chaffee.

4/ "Temporary" employees are defined as those employees who are hired for a specific period of 90 days or less or who are hired for a period not to exceed 180 days. They may be either full-time or part-time. The former have a regular scheduled work week of 35 to 40 hours, while the latter have a regular scheduled work week of at least 16 hours but less than 35 hours.

the new organizational scheme, the operation of these facilities is conducted under the overall supervision of a Resident Manager located at Altus who is responsible to the General Manager of the Fort Sill Consolidated Exchange at Fort Sill. 5/ The record reveals that Exchange activities at Altus comprise about 12 percent of the overall operations of the Fort Sill Consolidated Exchange.

The Exchange facilities at Fort Sill employ a total of 511 employees, of whom 495 employees are classified as "regular," with the remaining employees classified either as "temporary," or "casual." The AAFES operations at Fort Sill are carried on under the general supervision of the General Manager and subordinate officials at Fort Sill basically have the same classifications as those at Altus. 6/

At Fort Chaffee, which is the smallest of the three installations, the Exchange facilities comprise approximately 4 to 5 percent of the overall operations of the Fort Sill Consolidated Exchange. Fort Chaffee has only one sales outlet which is a retail main store. The normal employee complement at that location includes two supervisors, two or three general clerks, a control clerk and a stock clerk. However, during the summer encampment of National Guard units 7/ the Exchange operations are increased to include, in addition to the retail main store, three food service outlets, a retail annex and a service station. As in the case of the Altus Exchange, the activities of the Fort Chaffee Exchange are under the immediate supervision of a Resident Manager.

The evidence discloses that individual recommendations for employment, termination, pay increases and leave made by the Resident Manager at the Altus Exchange are almost invariably given final approval by the General Manager at the Fort Sill Exchange. In this connection, with respect to pay increases, the evidence reveals that of more than 200 pay increases recommended over a period of five years by the Resident Manager at the Altus Exchange not one was rejected by the General Manager. The Resident Manager at the Altus Exchange also has the authority to review performance evaluations and disciplinary actions by the various supervisors at that facility. Furthermore, according to

5/ In addition to the Resident Manager, the Altus Exchange hierarchy includes a Retail Branch Manager, an Assistant Retail Branch Manager, a Cafeteria Manager, a Service Station Manager, a Sales Supervisor, a Shift Supervisor, and a Receiving Supervisor.

6/ At Fort Sill, there are a total of 23 facilities, which include retail stores, cafeterias, snack bars, service stations and various concession and vending type service activities.

7/ The duration of the National Guard summer training period is from 90 to 100 days.

existing regulations, employees may discuss their grievances informally with their supervisors and with the Resident Manager. 8/

While the record reveals that, on occasion, one or more management officials and certain other employees from the Fort Sill Exchange are sent to the Altus Exchange to assist in merchandising, take inventory and perform other technical functions 9/ and that there is some temporary interchange of Fort Sill Exchange employees at Fort Chaffee during the summer encampment period, the number of such transfers and the degree of such interchange appear to be minimal.

Based on the foregoing circumstances, I find that the employees in the petitioned for unit share a clear and identifiable community of interest which is distinguishable from the Exchange employees at Fort Sill and Fort Chaffee. In this regard, the record reveals that, for all practical purposes, it is the Resident Manager at the Altus Exchange who effectively makes the day-to-day management decisions. Thus, although the same personnel policies, wage rates, fringe benefits, and other working conditions are applied generally to all employees of the Fort Sill Consolidated Exchange, it is left for the Resident Manager at the Altus Exchange to effectuate such policies for the employees at that facility. Furthermore, it is of particular significance that the Fort Sill Exchange is located approximately 56 miles from the Altus Exchange and about 289 miles from the Fort Chaffee Exchange and thus, by the very nature of their wide geographic separation, each facility is required to exercise a substantial degree of independence in its day-to-day operations. 10/ Accordingly, and noting that no labor organization seeks to represent employees on a more comprehensive basis than that described in the petition, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition:

8/ However, formal grievances must be directed to the General Manager at the Fort Sill Exchange. There is no evidence that a formal grievance was ever filed by an employee at the Altus Exchange.

9/ This occurs generally 5 or 6 times a year and normally involves a crew of sales and merchandising technicians who remain at Altus for only 2 or 3 days.

10/ Cf. Army and Air Force Exchange Service, MacDill Air Force Base Consolidated Exchange, A/SLMR No. 29.

All regular full-time and regular part-time employees of the Army and Air Force Exchange Service employed by the Altus Air Force Base Exchange, Altus, Oklahoma, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, management officials, and supervisors and guards as defined in the Order. 11/

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, AFL-CIO, Local 2586.

Dated, Washington, D. C.
July 28, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

11/ As noted above, the amended petition in the subject case excluded, among others, "temporary full-time" and "temporary part-time" employees. The record is unclear as to whether or not employees in such classifications, because of the peculiar nature of their employment, share a community of interest with the unit employees. Accordingly, I make no finding with respect to these classifications. Further, with respect to the requested exclusion of "casual" and "on-call" employees and the requested inclusion of off-duty military personnel in the regular full-time and regular part-time classifications, inasmuch as the record establishes there are no personnel presently employed by the Activity in such classifications, I shall not at this time make any findings in this regard.

July 28, 1972

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

NAVY EXCHANGE,
U. S. NAVAL AIR STATION
QUONSET POINT, RHODE ISLAND
A/SLMR No. 180

This unfair labor practice proceeding involved alleged Section 19(a)(1) and (6) violations of the Executive Order by the Respondent based on the conducting of a wage survey for the purpose of determining wage increases for non-appropriated fund employees exclusively represented by the Complainant, Local 767, American Federation of Government Employees, AFL-CIO (AFGE). The Complainant contended that the Respondent was under an obligation to consult with the Complainant concerning the wage survey and, specifically, to allow the AFGE to have an observer serve on the wage survey committee.

The Respondent defended its failure to include the AFGE on the wage survey committee primarily on the facts that it had informed the president of AFGE, Local 767, prior to initiating the official survey, that such survey would be conducted, that it had posted notices announcing that the survey would occur and had provided the Complainant with an opportunity to seek the appointment of an observer on the wage survey committee.

The Hearing Examiner recommended dismissal of the complaint. He found that the Complainant had been informed of the survey but did not request that it be afforded an opportunity to participate in the survey. Noting that the collective bargaining agreement between the parties stated that the Complainant "may" have an observer or "may" submit a list of observers, the Hearing Examiner stated that it was not incumbent upon the Respondent to insist that the Complainant exercise the option of participation in the survey.

Upon review of the record, including the Hearing Examiner's Report and Recommendations, and the exceptions and supporting brief filed by the Complainant, the Assistant Secretary adopted the findings, conclusions and recommendations of the Hearing Examiner. As to those credibility findings excepted to by the Complainant, the Assistant Secretary noted as a matter of policy that he would not overrule a Hearing Examiner's credibility resolutions except where the preponderance of relevant evidence convinced him that the Hearing Examiner's resolutions clearly were incorrect. As he found no basis in this case for overruling the Hearing Examiner's credibility resolutions, the Assistant Secretary dismissed the complaint.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NAVY EXCHANGE,
U.S. NAVAL AIR STATION
QUONSET POINT, RHODE ISLAND

Respondent

and

Case No. 31-4623 E.O.

LOCAL 767, AMERICAN
FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Complainant

DECISION AND ORDER

On April 21, 1972, Hearing Examiner Arthur M. Goldberg issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practice alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions to the Hearing Examiner's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Hearing Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Hearing Examiner's Report and Recommendations and the entire record in this case, including the exceptions and a supporting brief filed by the Complainant, I hereby adopt the findings,1/ conclusions, and recommendations of the Hearing Examiner.

1/ The Complainant excepted to certain credibility findings made by the Hearing Examiner. As the demeanor of witnesses is a factor of consequence in resolving issues of credibility, and as the Hearing Examiner has had the advantage of observing the witnesses while they testified, I find that as a matter of policy, I will not overrule a Hearing Examiner's resolution with respect to credibility unless the preponderance of all the relevant evidence convinces me that such resolution clearly was incorrect. I have examined carefully the record and find no basis for reversing the Hearing Examiner's credibility findings in the subject case.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 31-4623 E.O. be, and it hereby is, dismissed.

Dated, Washington, D.C.
July 28, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
OFFICE OF HEARING EXAMINERS
WASHINGTON, D. C.

NAVY EXCHANGE
U.S. NAVAL AIR STATION
QUONSET POINT, RHODE ISLAND

Activity

and

Case No. 31-4623 E.O.

LOCAL 767
AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Complainant

A. Gene Niro, Esq., Department of the Navy, Office of Civilian Manpower Management, Boston, Mass., for the Activity.

Neal Fine, Esq., American Federation of Government Employees, AFL-CIO, Washington, D. C., for the Complainant.

HEARING EXAMINER'S REPORT AND RECOMMENDATIONS

ARTHUR M. GOLDBERG, Hearing Examiner: This proceeding was heard in Quonset Point, Rhode Island, on January 13, 1972, and in Washington, D. C., on January 25, 1972, pursuant to a First Amended Notice of Hearing issued on November 16, 1971, 1/ by the Regional Administrator for the New York Region. 2/ This matter arises under Executive Order 11491 (hereinafter called the Order) pursuant to Section 203.8 of the Rules and Regulations of the Assistant Secretary for Labor-Management Relations (hereinafter called the Assistant Secretary). It was initiated by a Complaint filed on May 24 by Local 767, American Federation of Government Employees, AFL-CIO (hereinafter called the Union or the Complainant) alleging that Navy Exchange, U. S. Naval Air

1/ Unless otherwise noted all dates hereinafter were in 1971.
2/ The original Notice of Hearing issued on November 12.

Station, Quonset Point, Rhode Island (hereinafter called the Activity, the Respondent or the Exchange) had violated Section 19(a)(6) of the Order by "refusing to consult with [Complainant] as required by this Order, concerning changes in the recent Wage Survey procedures." 3/

At the opening of the hearing the Complainant moved to amend the Complaint to allege a Section 19(a)(1) violation of the Order flowing from the same facts which gave rise to the Section 19(a)(6) allegation. To the extent that a Section 19(a)(1) violation could arise from those facts and those facts only and thus be a derivative violation of the Order the amendment was allowed.

All parties were represented at and participated in the hearing and were afforded full opportunity to be heard, to introduce evidence, to examine and cross-examine witnesses, to present oral argument, and to file briefs. Oral argument was waived and briefs were filed by the Union and the Respondent.

Upon the entire record in the case, from my reading of the briefs, and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. Background

The Union was recognized as the exclusive bargaining representative of Respondent's employees in December 1969. After protracted negotiations a first collective bargaining agreement was signed on January 13. However, pursuant to its terms and Section 15 of the Order the agreement was not effective until approved by the Navy Resale System Office (hereinafter called NAVRESO). That approval was granted on March 2 and the agreement became effective on March 3.

Exchange employees are "non-appropriated fund employees" whose wages are set on the basis of periodic surveys of the wages paid for comparable job classifications by retail establishments in the same labor market as the Exchange.

3/ As filed the Complaint alleged violations of Section 19(a)(1), (2), (4) and (6) of the Order. On July 29 the Acting Regional Administrator for the New York Region dismissed the complaint in its entirety. However, acting on the Union's Request for Review of that dismissal the Assistant Secretary on October 29 directed that a notice of hearing be issued on the Section 19(a)(6) portion of the Complaint.

At all times material herein the applicable regulations of the Secretary of the Navy and instructions issued under those regulations provided for a "Wage Survey Committee" as follows:

CHAPTER III--ESTABLISHING WAGE SURVEY COMMITTEES

WAGE SURVEY COMMITTEE

Wage surveys will be conducted under the direction of the Exchange Officer. He will be responsible for convening a Wage Survey Committee whose minimum composition will include the Exchange Officer (or duly authorized representative), and the Personnel Assistant or Office Manager. In large Exchanges, committee members may be selected to represent specific services such as laundry, gas station, office, and retail store. "Recognized employee organizations may have observers present during the conduct of wage surveys . . ." in accordance with SECNAV INSTRUCTION 12000.15, dated 21 August 1964, Appendix 1. Such observers, if provided for in the Employee Management Agreement will be selected from a list of Exchange employees submitted by the employee organization. The status of such employee organization observers is that of participation with the committee throughout the process of the survey. However, they have no vote on the Wage Survey Committee. Observers, of course, must maintain the confidence of all wage data in the same manner as all other persons participating in the survey. These restrictions are necessary, since wage data are normally obtained under a promise that all information provided by cooperating firms will be confidential. However, employees may be informed of the companies from which data were obtained. 4/

4/ On January 12 NAVRESO issued a revised Instruction modifying the paragraph on "Wage Survey Committee." The new instruction provides:

WAGE SURVEY COMMITTEE

Wage surveys will be conducted under the direction of the Activity Officer. He will be responsible for convening a Wage Survey Committee

4/ (Continued)

whose minimum composition will include the Activity Officer (or duly authorized representative), and the Personnel Assistant or Office Manager. In large Activities, committee members may be selected to represent specific services; such as, laundry, gas station, office, retail store, food, and recreation. "Recognized employee organizations may have observers present during the conduct of wage surveys . . ." in accordance with SECNAV INSTRUCTION 12000.15, dated 21 August 1964, Appendix 1. Such observers, if provided for in the Employee-Management Agreement, will be selected from a list of Activity employees submitted by the employee organization. The status of such employee organization observers is that of participation with the committee in the planning and analysis process of the survey. However, they have no vote on the Wage Survey Committee. Observers, of course, must maintain the confidence of all wage data in the same manner as all other persons participating in the survey. These restrictions are necessary, since wage data are normally obtained under a promise that all information provided by cooperating firms will be confidential. However, employees may be informed of the names of companies from which data were obtained.

This revised Instruction cuts down the role of the employee organization observer by limiting his participation with the committee to the planning and analysis process of the survey whereas the superseded Instruction provided that "[t]he status of such employee organization observers is that of participation with the committee throughout the process of the survey." While copies of both Instructions were introduced into evidence the Respondent was not put on notice that this apparently unilateral diminution of the status and role of the exclusive representative of the employees in determining and protecting this most basic element of the terms and conditions of their employment could be the basis for an unfair labor practice finding. Accordingly, I find that this action by Respondent was not fully litigated and shall make no finding or recommendation with respect to this revision of the Instruction.

Correspondence from NAVRESO established that the revised Instruction was not distributed to the exchanges until February 15. Accordingly, the actions of the parties which took place before that date, which I find to be dispositive of this matter, could not have been influenced by the revisions.

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In accordance with modifications of the collective bargaining agreement required by the NAVRESO approval of March 2 the contract provides in Article VII, Section 6:

> In accordance with NAVRESO System Inst. 12550.1A, the Union may submit a list of employees of the Exchange to the Employer who will select an observer for a wage survey. The status of such employee organization observer is that of participation with the committee in the planning and analysis process of the survey. (Emphasis supplied.)

Sometime prior to Christmas 1970 Lt. Cmdr. Kenneth Garrett, Navy Exchange officer at Quonset Point, conducted an unofficial wage survey of retail establishments in the area to see if a wage increase would be necessary so that he could project sales and payroll costs for the coming months. 5/ At the 1970 Christmas party for Exchange employees Garrett announced that the preliminary survey had been made and "predicted during the following year, 1971, that there would be raises for some employees." Garrett testified that this was the first occasion on which he disclosed the fact of the unofficial survey. 6/

Following execution of the collective bargaining agreement on January 13 Kearney asked Garrett if he would now conduct a wage survey. Garrett replied that he did not have authority on his own to conduct a wage survey but that he had already accomplished all of the leg work for a survey and had compiled the data. Kearney said he would write to Rear Admiral Lyness, commanding officer of NAVRESO in Brooklyn, New York, in regard to a survey.

On January 22 Kearney wrote to Lyness complaining that Garrett's hands were tied in respect to conducting a wage survey and asked that Lyness do what he could to expedite a survey.

Immediately upon receiving a copy of Kearney's letter to Lyness Garrett called Frank Rodd, the wage survey specialist at the NAVRESO office in Brooklyn, and asked for permission to conduct an official survey, explaining to Rodd that the preliminary survey had disclosed that wages at the Exchange were below the market level and that Exchange salaries should be raised to that level as soon as possible. Rodd replied that

5/ Garrett explained that a wage survey is "official" only when authorized by NAVRESO and the commanding officer of the base. Wages must be changed on the basis of the findings of an official wage survey.

6/ Daniel J. Kearney, vice-president of the American Federation of Government Employees and Joseph Matrullo, president of Local 767, recalled that a wage survey for Respondent's employees had been discussed during the latter stages of contract negotiations.

approval would be granted if the commanding officer at Quonset Point gave his permission. After receiving the approval from the base commander Garrett was given permission by Rodd to announce to the Exchange employees that a wage survey would be conducted. Garrett advised Rodd that the survey would be announced the following day.

II. Announcement of the Wage Survey

A. The Events of January 27

On January 27 Garrett prepared a memorandum over his signature addressed to All Navy Exchange Employees which read:

> Subject: Wage Survey
>
> 1. Effective this date, a wage survey of comparable jobs and positions of those in the Exchange with the local community will be made.
>
> 2. Employees may look forward to pay increases if warranted effective the pay period of 9 April 1971.

Garrett directed his secretary, Mrs. Lucille Dexheimer, to duplicate the memo and distribute copies through the inter-office mail system to all of the approximately 24 department managers for posting on the bulletin boards throughout the Exchange, some 22 in number. In addition, Garrett testified, he directed Dexheimer to contact Matrullo, the Union's president and to ask Matrullo to come to Garrett's office. 7/

Dexheimer recalled that she telephone Matrullo before noon and asked that he come to Garrett's office during his lunch hour. Garrett testified that when Matrullo came to his office he told the Union president "that there was a 'bennie' for Mr. Kearney in his letter to the Admiral." 8/ Garrett explained that Kearney's letter had "broke things loose" and Garrett was now announcing a wage survey. Garrett recalled that he had the memo announcing the survey in his hand during the conversation but could not state with assurance that he had shown the document to Matrullo. Garrett testified that Matrullo did not ask any questions about the survey and that the Union president's only comment after being told of the survey was, "Good."

Dexheimer testified that she had occasion to go into Garrett's office to pick up some papers while Matrullo was there. While there Dexheimer

7/ Matrullo is not an employee of the Exchange and works in a different area of the base.

8/ "Bennie" is a Navy term for a beneficial situation.

overheard Garrett tell Matrullo that the survey was to be conducted and that he wanted to show Matrullo the announcement before it was distributed for posting that day.

Matrullo denied that he had been called to Garrett's office on January 27 and stated that the first time he had seen the memo announcing the wage survey was at the hearing on January 13, 1972. Later, during a second appearance as a witness in this proceeding, Matrullo testified that he could not recall receiving a telephone call from Garrett on January 27. Pressed to recall the events of January 27 Matrullo testified:

> I am testifying that I do not know whether I was there [in Garrett's office] on that day. To my knowledge, I wasn't.

Finally, Matrullo testified that the first he learned of the wage survey was in a telephone call from Kearney who told Matrullo that Admiral Lyness had written that a survey had been started. However, even as to this telephone conversation Matrullo's testimony was confused. Thus, under examination by Complainant's counsel the following colloquy occurred:

> Question: Can you remember the date [of Kearney's call]?
>
> Answer: It was in May, sometime.
>
> Question: Pardon?
>
> Answer: Well, I don't know exactly the date. Offhand, I don't know.
>
> Question: Well, was it in February or January?
>
> Answer: That was in February. February 5, if I'm not mistaken.

From my observation of Matrullo as a witness and the inconsistencies in his testimony I find that he was an unreliable witness whose recollection of the events is not to be credited. Dexheimer on the other hand, no longer employed by the Respondent and with no interest in the outcome of these proceedings, impressed me as a credible witness. While there are certain variances between her recollection of the meeting in Garrett's office and that of Garrett, these are understandable in light of the length of time between the occurrence and the hearing. I find that in all significant matters Dexehimer credibly corroborated Garrett's version of the events of January 27.

Accordingly, I find that on January 27, after receiving permission to conduct an official wage survey affecting the wages of the employees, Garrett personally advised the Union's president that the survey was authorized and would be conducted and afforded the Union an opportunity to exercise its rights, if any, 9/ to have an observer participate in the wage survey.

B. Announcement and Discussion of the Wage Survey

A number of witnesses called by Respondent testified that copies of Garrett's January 27 memo announcing the wage survey were posted on bulletin boards in places where in the normal course of events they would have been seen by Exchange employees. Thus, Nancy Eggett testified that a copy of the memo was posted on a bulletin board in a passageway leading from the office to the cafeteria, the barbershop and other parts of the Exchange. Nicholas Apostolous testified that at the time of the posting in January the Exchange was being renovated and that employees had to go through that passageway to reach the cafeteria to avoid going outside the building.

9/ Respondent denies that the Union had any right on January 27 to participate in the survey. The Activity notes that the collective bargaining agreement providing that right was not yet in effect and the Instruction reads, after stating that "recognized employee organizations may have observers present . . .", "Such observers, if provided for in the Employee Management Agreement will be selected from a list of Exchange employees submitted by the employee organization." (Emphasis in original.) Respondent argues that this language limits the right to an observer to situations where an agreement so provides. However, the language is equally susceptible of the interpretation that it establishes the manner of selection only and does not limit the right to observers. In any event, I need not resolve this issue as I find that the Union was not denied the right to participate in the survey on the basis of the interpretation argued by Respondent, but rather, after being informed of the survey Matrullo did not see fit to ask for such participation.

As to the Union's complaint that Garrett did not ask the Union to submit a list of proposed observers, I note that the Instruction and the collective bargaining agreement both state that the Union "may" have an observer or "may" submit a list of proposed observers. I do not find that it was incumbent on Respondent to insist that the Union exercise the option of participation in the survey.

Apostolous and Paul King, the retail store manager, both testified that they discussed the wage survey announcement at meetings with the employees in their departments and that Union shop stewards had been present during the discussions.

In addition, Dexheimer testified that three or four days after she typed and distributed the wage survey announcement on January 27, Penedo, the Union's chief steward came to her and asked for extra copies of the notice. Dexheimer gave Penedo the extra copies of the memo which he requested.

Thus, in addition to Garrett's advice to Matrullo on January 27 that the wage survey was authorized and underway, various other Union officials knew or had reason to know that an official wage survey had been started but no request for inclusion of a Union observer on the wage survey committee was made by the Union.

III. Subsequent Union-Management Discussions and Union Reaction to the Wage Survey

On February 3 Admiral Lyness replied to Kearney's letter to him dated January 22. Lyness informed Kearney that a wage survey had been started on January 27 and noted that the effective date of results of the survey "should be 9 April." Kearney testified that he received this letter on February 5 and that it constituted the only notification of the survey he received from the Navy.

Upon receipt of Lyness' letter Kearney called Matrullo. Kearney testified that Matrullo was surprised when advised that the survey was underway. Matrullo testified that he first learned of the wage survey from Kearney's call. 10/

In addition to calling Matrullo Kearney contacted Garrett and arranged for a meeting on February 9. As well, Kearney wrote to Garrett, stating inter alia:

> Further evidence of good faith is your speed-up of the wage survey . . . . . .

10/ From my observation of Matrullo during his two appearances as a witness in this proceeding I conclude that he may well have not realized the import of Garrett's January 27 announcement to him of the "bennie" for Mr. Kearney and the commencement of the wage survey.

Kearney and Matrullo attended the February 9 meeting with Garrett. Kearney testified that Garrett told them that the results of the survey and the underlying material had been forwarded to NAVRESO. Kearney and Matrullo claimed that a request was made for a list of the stores surveyed and a copy of the data assembled but that Garrett denied this information to the Union on the grounds that it was confidential. Garrett testified that Kearney asked about the Union's right to have an observer participate in the survey and that he informed Kearney that the aspect of the survey in which such an observer would have been involved had been completed. Kearney claimed that when he had raised the issue Garrett had stated that to involve the Union in the survey at that time would require recalling the information from NAVRESO with a possible delay in implementation of the results of the survey. Kearney stated that this was one of the considerations which caused him not to object at that time to the conduct of the survey. Kearney noted that if the results of the survey were recalled and this led to an additional raise of 5 cents such an increase would not lead to greater income for the employees because the earlier implementation of a smaller raise would equal the later grant of a larger amount. In addition, Kearney noted the large turnover in Exchange personnel and opined that a later increase would have the effect of denying any boost in pay to those who quit or were transferred. Moreover, Kearney testified that he was under the impression that the survey would lead to substantial wage increases and "I didn't know how bad it was until later." Rather than objecting, Kearney testified that he was very pleased that the survey was completed and that he thanked Garrett. 11/

Following this meeting Kearney wrote to Garrett on February 10, stating in pertinent part:

> It was pleasant to visit with you yesterday, and it was great to hear that you had acted so fast on our request for a wage survey. I understand the starting date, as stated in Admiral Lyness' letter, was January 27th, which would make it effective on April 9th.

11/ Garrett denied that he had warned that any Union objections to the survey could lead to delay in implementation of the results. I do not credit Kearney and Matrullo in their claim that Garrett had made that threat. Both the January 27 wage survey announcement and Lyness' February 2 letter established the effective date of any wage increase as April 9. Thus, Kearney had no reason to anticipate an earlier effective date. Moreover, Navy rules require that the increase be implemented within a set period from the start of the survey and precluded delay past April 9. From my observation of Garrett and his reference to regulations in his testimony I find that he is a man who goes strictly by the book and would not have threatened a delay in implementation when the Navy's rules precluded such action.

Kearney went on to ask if the starting date of the survey could be pushed back to mid-December 1970 so that an earlier effective date for the wage increases could be secured. 12/

When shown this letter Kearney testified that he had not meant to approve the survey but was merely relying on Garrett's word that the survey was fair and that all the employees would receive a wage raise.

Also on February 10 Kearney issued a leaflet on the Union's letterhead addressed to "All Exchange Employees." As it relates to this proceeding the leaflet reads:

> This meeting was held to obtain answers to a variety of issues raised at a previous Union meeting regarding working conditions, employees wages, etc. We are making this report for your information.
>
> 1. Wage Grade Survey -- We are pleased to announce that, at the request of your Union and through the quick action of Commander Garrett and NESSO (sic), data has already been forwarded to New York for review, which will result in pay raises for all Wage Grade employees on or before April 9th. The data, at this point is confidential, 13/ but we can say that in most instances the pay will be equal to that of the folks at Newport Exchange, where we have exclusive and have a signed contract which has been in effect several months.

The Union issued a second leaflet relating to the wage survey on March 22. This leaflet reads:

> GOOD NEWS
>
> AFGE Local 767 is pleased to announce that the current survey for all employees of the Navy Exchange, Quonset Point and Davisville, has been completed.
>
> Through the efforts of AFGE the Exchange employees will receive as high as 65¢ an hour increase in their hourly rate. It is to be noted, these increases will be the

12/ This request for an earlier date for the survey with a resulting earlier effective date for the increases further buttresses the finding that Kearney's claim that Garrett had threatened a delay if the Union insisted on participation in the survey was contrary to the facts.

13/ Apparently Kearney also regarded the wage survey information as confidential.

> largest ever for these employees and came only through the efforts of the largest union in Government, AFGE. The small independent association who turned their back on these employees as they did the Commissary employees, had no influence whatsoever in the survey results.

Thereafter, the results of the survey were announced. The Union, dissatisfied with the wage increases, pursued and secured the material relating to the survey and filed the instant complaint.

CONCLUSIONS

I have heretofore found that on January 27 Garrett advised Matrullo, the Union's president, that the survey had been authorized and was underway. However, Matrullo did not ask that the Union be afforded an opportunity to participate in the survey or to submit a list for selection of a Union observer to serve with the Wage Survey Committee. I have further found that by posting and dicussion of the wage survey announcement the Union was further advised that the survey was in process. Moreover, the Union's chief steward was given additional copies of the wage survey announcement shortly after it was issued.

The Union's conduct following Kearney's receipt of Lyness' letter on February 3 wherein the fact of the survey and the effective date for implementation of its results were set forth are inconsistent with a claim that the Union was denied a role in the survey which resulted in modifications of unit employee wages. Rather, Kearney's account of his February 9 meeting with Garrett and the leaflets issued by the Union to the employees lends substance to Respondent's claim that the Union did not object to the conduct of the survey, did not ask to participate in the survey and initiated this proceeding only because it was disappointed in the results of the survey. Accordingly, I find that the Complainant has not established that Respondent violated Section 19(a)(6) of the Order. 14/ United States Department of Defense, Department of the Navy, Naval Air Reserve Training Unit, Memphis, Tennessee - A/SLMR No. 106.

14/ In view of this finding I shall also recommend dismissal of the Section 19(a)(1) allegation added at the hearing.

RECOMMENDATIONS

Upon the basis of the foregoing findings and conclusions it is recommended that the Complaint against the Respondent, Navy Exchange, U. S. Naval Air Station, Quonset Point, Rhode Island, Case No. 31-4623 E.O. be dismissed.

ARTHUR M. GOLDBERG
Hearing Examiner

Dated at Washington, D. C.
April 21, 1972.

July 28, 1972

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

NAVAL WEAPONS STATION,
YORKTOWN, VIRGINIA
A/SLMR No. 181

The subject case arose as the result of a representation petition filed by District 74 of the International Association of Machinists and Aerospace Workers, AFL-CIO (IAM), seeking a unit of all Wage Board employees of the Naval Weapons Station, Yorktown, Virginia. The Intervenor, Local R4-1, National Association of Government Employees, Independent (NAGE), which is the incumbent exclusive representative in the petitioned for unit, took the position that the claimed unit is inappropriate and that a single unit, including the employees in the petitioned for unit and employees in two other units for which the NAGE is the exclusive representative (firefighters and the General Schedule employees), is appropriate. The Activity was of the view that the unit petitioned for by the IAM is appropriate.

The Wage Board employees in the petitioned for unit were covered by negotiated agreements between the Activity and the NAGE commencing in 1967. The current agreement ran for a two-year period from Decmeber 22, 1969 and did not bar the petition in this matter.

The Assistant Secretary found that the petitioned for unit composed of all Wage Board employees was appropriate for the purpose of exclusive recognition and would promote effective dealings and efficiency of agency operations. In this regard, he noted the long, established bargaining history in the petitioned for unit; the existence of certification bars to consideration of a more comprehensive unit; the fact that the NAGE did not petition for a larger unit; and the position of the Activity that the unit petitioned for was appropriate.

A/SLMR No. 181

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NAVAL WEAPONS STATION,
YORKTOWN, VIRGINIA

Activity

and

Case No. 22-2881

DISTRICT 74, INTERNATIONAL ASSOCIATION
OF MACHINISTS AND AEROSPACE WORKERS,
AFL-CIO

Petitioner

and

LOCAL R4-1, NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES, INDEPENDENT

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Michael B. Cahir. 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 a brief filed by the NAGE 2/ the Assistant Secretary finds:

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

2. The IAM seeks an election in a unit of all nonsupervisory, ungraded (Wage Board) employees at the Naval Weapons Station, Yorktown, Virginia, excluding all graded (General Schedule) employees, professional employees, employees engaged in Federal personnel work other than those in a purely clerical capacity, management officials, supervisors, guards and all employees at the St. Julien's Creek Annex.

The NAGE, which is currently recognized as the exclusive bargaining representative for the employees in the petitioned for unit, takes the position that the unit sought is not appropriate and that the appropriate unit is a single unit consisting of all the Activity's employees currently represented by the NAGE under three separate recognitions.3/ The Activity contends that the petitioned for unit is appropriate. In support of its contention that the employees in the petitioned for unit have a clear and identifiable community of interest separate and apart from that of other Activity employees, the IAM places primary emphasis on the bargaining history in the claimed unit and the fact that there is no petition for any other unit.

The Naval Weapons Station, Yorktown, Virginia is a complex covering approximately 11,000 acres and employing approximately 2,261 persons. There are over 200 significant buildings and 141 magazines on the base.

1/ At the hearing, the Intervenor, Local R4-1, National Association of Government Employees, Independent, herein called NAGE, which is the current exclusive representative of the employees in the petitioned for unit, attempted to introduce evidence as to the appropriateness of a broader Activity-wide unit. The Petitioner, District 74 of the International Association of Machinists and Aerospace Workers, AFL-CIO, herein called IAM, objected on the grounds that this line of questioning went beyond the scope of the petitioned for unit. The Hearing Officer sustained the objection on the basis that certification bars exist in two units which cover the remaining employees of the Activity and because the NAGE's intervention in this matter was based solely on its incumbent status in the petitioned for unit. In view of my findings below, and noting that the NAGE did not file a petition for a broader Activity-wide unit, I find that the Hearing Officer's ruling was not prejudicial.

2/ The IAM filed an untimely brief which has not been considered.

3/ As noted in footnote 1 above, the NAGE did not cross petition for an election in such a unit and appears only as an intervenor in this proceeding.

(Continued)

The record discloses that the mission of the Activity is to serve the United States fleet through receiving, overhauling, assembling, loading, and testing all types of ammunition presently in usage throughout the fleet.

Recently transferred to the Activity's command is the St. Julien's Creek Annex, which is located approximately 55 miles away from the main complex and which is not yet fully integrated into the Activity's centralized organization. In addition, the record reveals there are several tenant organizations located at the Naval Weapons Station, Yorktown. These include two organizations composed solely of military personnel and a representative of the Bureau of Fisheries.

The record reflects that the NAGE gained exclusive recognition on June 3, 1966, for a unit including most of the nonsupervisory Wage Board employees at the Activity. The NAGE entered into a negotiated agreement covering this unit on July 28, 1967, and on December 22, 1969, a second agreement running for a period of two years was approved. This latter agreement covered a unit which included all of the approximately 1,120 nonsupervisory Wage Board employees at the Activity. The instant petition covering the employees in this exclusively recognized unit was filed timely by the IAM on October 14, 1971.

The evidence establishes that since August 25, 1971, the NAGE has been the certified representative for a unit of all the General Schedule (GS) employees of the Activity, excluding firefighters and the employees at the St. Julien's Creek Annex. Additionally, the NAGE is the exclusive representative for a separate unit of firefighters at the Activity by virtue of a certification issued on June 24, 1971. All of the parties stipulated that the employees at the St. Julien's Creek Annex were not involved in this proceeding. 4/

Based on the foregoing circumstances, I find that a unit encompassing all the Wage Board employees at the Naval Weapons Station, Yorktown, Virginia is appropriate for the purpose of exclusive recognition. Thus, the record reflects that there is a long established bargaining history as to the employees in the petitioned for unit; that certification bars to the petition herein exist with respect to other employees of the Activity who are included in separate units covering firefighters and GS employees; that, in fact, no labor organization has petitioned for a more comprehensive unit; and that the Activity has no objection to the petitioned for unit. Under these circumstances, I find that the employees in the claimed unit share a clear and identifiable community of interest and that such a unit will promote effective dealings and efficiency of agency operations.

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

> All Wage Board employees of the Naval Weapons Station, Yorktown, Virginia, excluding all General Schedule employees, employees at the St. Julien's Creek Annex, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Executive Order. 5/

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 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 be rehired or reinstated before the election date. Those eligible

4/ The record reveals that all nonsupervisory, nonprofessional employees at the St. Julien's Creek Annex are covered by a negotiated agreement between the Activity and the Laborer's International Union, dated June 9, 1971.

5/ The Activity placed in evidence a list of employees who it designated as supervisors. 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. Although the parties left to the Assistant Secretary the determination with respect to the status of "temporary" employees, the record reveals that no "temporary" employees were employed by the Activity at the time of the hearing in this matter. Accordingly, I make no finding with respect to the eligibility of such "temporary" employees.

shall vote whether they desire to be represented for the purpose of exclusive recognition by District 74, International Association of Machinists and Aerospace Workers, AFL-CIO, or by Local R4-1, National Association of Government Employees, Independent, or by neither.

Dated, Washington, D.C.
July 28, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

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

ADJUTANT GENERAL, STATE OF GEORGIA
AIR TECHNICIAN DETACHMENT AT
DOBBINS AIR FORCE BASE, GEORGIA, AND
TRAVIS FIELD, SAVANNAH, GEORGIA
A/SLMR No. 182

This unfair labor practice proceeding involved an alleged violation of Section 19(a)(6) of the Executive Order by the Adjutant General, State of Georgia due to his failure to grant a formal hearing so that the Complainant, Aaron B. Roberts Chapter, Association of Civilian Technicians, Inc. (ACT), might present its grievance to an unbiased, impartial hearing officer. The grievance pertained to the forced wearing of military uniforms by the Air National Guard technicians.

The Respondent's defense to the complaint was that the subject matter of the purported grievance was non-grievable as Adjutant General had no authority to decide the issue involved because National Guard regulations clearly covered such issue.

The Hearing Examiner concluded that there was adequate consultation by the parties over the Complainant's grievance and that the Respondent was under no obligation under the Executive Order to grant the requested hearing. He, therefore, recommended dismissal of the 19(a)(6) complaint.

Noting that no exceptions were filed to the Hearing Examiner's Report and Recommendations and the Hearing Examiner's findings that there was adequate consultation between the parties, no evidence of bad faith, and no obligation on the Respondent to grant the requested hearing, the Assistant Secretary concluded that the Complainant had not sustained its burden of proof that the Respondent's conduct violated Section 19(a)(6) of the Order. Accordingly, the Assistant Secretary dismissed the complaint in its entirety.

A/SLMR No. 182

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ADJUTANT GENERAL, STATE OF GEORGIA
AIR TECHNICIAN DETACHMENT AT
DOBBINS AFB, GEORGIA AND TRAVIS
FIELD, SAVANNAH, GEORGIA

Respondent

Case No. 40-3147 (CA 26)

and

AARON B. ROBERTS CHAPTER,
ASSOCIATION OF CIVILIAN TECHNICIANS, INC.

Complainant

DECISION AND ORDER

On April 18, 1972, Hearing Examiner Milton Kramer issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practice alleged in the complaint, and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Hearing Examiner's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Hearing Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Hearing Examiner's Report and Recommendations and the entire record in this case 1/, and noting that no exceptions were filed, I hereby adopt the findings, conclusions 2/, and recommendations of the Hearing Examiner.

1/ The Hearing Examiner inadvertently failed to introduce the formal papers in the instant case into the record. However, on the record, he clearly indicated that such documents would be included in the file and would be considered by the Assistant Secretary. In these circumstances, the record in the instant case transferred to the Assistant Secretary was determined to have included the formal papers within the meaning of Section 203.22(b) of the Assistant Secretary's Regulations.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 40-3147 (CA 26) be, and it hereby is, dismissed.

Dated, Washington, D. C.
August 3, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

2/ In reaching the disposition herein, I have relied solely on the Hearing Examiner's findings that there was adequate consultation between the parties concerning the grievance involved, that there was no evidence of bad faith by the Respondent and, further, that the Respondent was under no obligation under the Executive Order to grant a formal hearing requested by the Complainant. Under these circumstances, I find it unnecessary to pass upon and specifically do not adopt the additional rationale, findings and conclusions of the Hearing Examiner contained in his Report and Recommendations.

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

ADJUTANT GENERAL, STATE OF GEORGIA
AIR TECHNICIAH DETACHMENT AT
DOBBINS AIR FORCE BASE, GEORGIA AND
TRAVIS FIELD, SAVANNAH, GEORGIA

Respondent CASE NO. 40-3147 (CA 26)

and

AARON B. ROBERTS CHAPTER, ASSOCIATION
OF CIVILIAN TECHNICIANS,

Complainant

Vincent J. Paterno, National President, and
John T. Hunter, Executive Vice-President
for Association of Civilian Technicians, Inc.
Col. Paul E. Innecken, Technician Personnel
Officer, for the Adjutant General

Before: Milton Kramer, Hearing Examiner

REPORT AND RECOMMENDATION

Statement of the Case

This case was initiated by a Complaint dated July 24, 1971, by Aaron B. Roberts Chapter of the Association of Civilian Technicians, Inc. (hereinafter sometimes referred to as "ACT" or the "Union") against the Respondent (hereinafter sometimes referred to as the "Activity") under Executive Order 11491 (hereinafter sometimes referred to as the "Order") signed by Henry E. Bagley, Acting State Chairman. The Complaint was filed July 26, 1971 on behalf of the Union's chapters at Dobbins Air Force Base at Atlanta, Georgia and at Travis Field, Savannah, Georgia. It alleges that the Respondent violated and is violating Section 19(a)(6) of the Order in refusing "a Formal Hearing so that our Air Technician membership might present their case to an unbiased, impartial hearing officer." The Complaint states that the Complainant's "efforts" and the Respondent's "answers" are contained in correspondence between them copies of which are attached to the Complaint. It states further that there is no established grievance procedure.

Pursuant to §203.5 of the Regulations under the Order (29 C.F.R. §203.5), the Area Administrator made an investigation and report to the Regional Administrator. 1/ On August 9, 1971, the Regional Administrator dismissed the Complaint on the grounds that (1) the conduct of the Respondent that underlaid the request for the formal hearing appeared to emanate from the policy of the National Guard Bureau expressed in a published regulation, that the propriety of the position of the Respondent therefore appeared to be "neither negotiable nor grievable," and that therefore the refusal of a formal hearing on the subject was not violative of Section 19(a)(6) of the Order, and (2) even if the matter was grievable, the refusal to grant a formal hearing on the issue would not be a violation of that Section especially in the absence of a collective bargaining agreement. The Area Administrator advised the Complainant that a review of the Area Administrator's action could be obtained, and stated the procedure and requirements for obtaining such review.

On August 20, 1971, the Union applied to the Assistant Secretary for Labor-Management Relations for a review of the Regional Administrator's dismissal. On December 15, 1971, the Assistant Secretary concluded that the issues raised by the Complaint could best be resolved on the basis of record testimony and directed the Regional Administrator to reinstate the Complaint, and to issue a notice of hearing. On December 17, 1971, the Regional Administrator reinstated the Complaint and on December 23, 1971 issued a Notice of Hearing to be conducted on February 9, 1972 in Atlanta, Georgia.

The hearing was held on the date and at the place specified in the Notice. At the hearing the Complainant was represented by its National President and Executive Vice-President, and the Activity was represented by its Technician Personnel Officer. Both parties were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue orally, and file briefs.

At the conclusion of the hearing, March 1, 1972 was fixed as the date for filing briefs. The Respondent filed a timely brief but the Complainant Union has not filed a brief nor taken any other action.

1/ The report of the Area Administrator to the Regional Administrator was treated by all concerned as part of the record in this case and it is so considered here.

Facts

The Complainant is the recognized and accredited collective bargaining representative of the Technicians (mechanics) in the Air National Guard of Georgia, and has been recognized as such representative since prior to Executive Order 11491 of October 29, 1969. During this time there have been no collective bargaining agreements between the Complainant and the Respondent. Although civilian employees, such Technicians, as a condition of their employment, are required to be members of the Air National Guard. 2/ The Technicians are "employees" covered by the Executive Order. 3/

On February 24, 1971, Complainant wrote a letter to Respondent, Major General S. Ernest Vandiver, complaining that the requirement that Technicians wear the appropriate uniform while on duty as Technicians imposed hardships on them and created a serious morale problem. The letter stated that an earlier request by the Savannah Chapter to be relieved of the obligation to wear the uniform had been rejected on the ground that Air National Guard Regulations required it, that that ground was no longer sound, and that the wearing of the uniform had become a negotiable matter. Prior to bringing this matter to the Adjutant General the Union had taken it up with the Base Detachment Commanders but had not obtained satisfaction.

Paragraph 2-5, NGR 690-2, ANGR 40-01, provides:

> "2-5. Wearing of the Uniform. Technicians in the excepted service will wear the military uniform appropriate to their service and federally recognized grade when performing technician duties. When the uniform is deemed inappropriate for specific positions and functions, adjutants general may authorize other appropriate attire. If the adjutant general exercises this prerogative, this does not entitle technicians to payment of a uniform allowance authorized for Department of Defense civilian personnel."

That prerogative of authorizing other appropriate attire was not exercised by Respondent until June 21, 1971 and then only to the limited extent described below.

2/ 32 U.S.C.A. §709(b).

3/ Mississippi National Guard, A/SLMR No. 20.

A conference was held by Complainant and Respondent concerning the letter of February 24, 1971 at which a number of matters was discussed and Respondent asked Complainant to furnish certain information. This information was furnished in a letter dated March 4, 1971. On March 24, 1971 the Adjutant General replied that he would make a study of the matter, would collaborate with the Adjutants General of other states, and would consider the future of the technician program and the morale of the men.

On March 29, 1971 the Complainant wrote two memoranda addressed to Respondent. One, which was not formally submitted until later, stated that it was the desire of the membership of Complainant to file unfair labor practice charges against Respondent under Section 19 of the Executive Order. It stated that such action was taken because of the failure of Respondent to follow "interim guidance on procedures for handling written communications" in accordance with a letter from the State Technician Personnel Office which was stated to require an answer within fourteen days. It stated also that instructions from the Assistant Adjutant General for Air on March 21, 1971 to the senior Technicians that Technicians continue to wear the uniform and observe military protocol was improper in view of the status of negotiations. It stated further that a state-by-state survey was conducted by Respondent to determine the position of other state organizations, but that ANGR 40-01, ¶2-5, gave Respondent, not the other states, the authority to eliminate poor morale because of the uniform issue. The other communication of March 29 was from Henry E. Bagley, the Acting State Chairman of ACT (later State Chairman) who was also President of the Dobbins Air Force Base Chapter, in reply to the Respondent's letter of March 24, 1971. It stated that he and the President of the Savannah Chapter had had meetings of their Chapters, had discussed and considered the Respondent's letter of March 24 and the good faith and interest shown, and had decided to wait until May 26, 1971 before taking "legal action" to give Respondent time to consult with the other Adjutants General.

On May 25, 1971 the Respondent replied to the March 29, 1971 communication from the Union that had been submitted. It reminded Complainant that Respondent had previously said that his decision would depend largely on his consultations with other Adjutants General. It stated that a meeting of the Adjutants General Association had recently been held and that the uniform question had been considered and a quoted resolution adopted. The resolution recommended to the National Guard Bureau that paragraph 2-5 of its regulations be amended to retain the first sentence thereof and delete the remainder so that the requirement of Technicians wearing the appropriate military uniform when performing technician duties would be unqualified. General Vandiver stated in his letter that he had voted for the resolution and that his policy was in support of it, that it had always been the policy of his office that Technicians wear the appropriate uniform, and that he saw no reason to change that policy.

On June 3, 1971 the Complainant wrote to the Respondent that because of the Respondent's denial of the request to make the wearing of the uniform optional the membership of the union had directed the filing of a formal grievance, and that it requested a formal hearing before an impartial board; it also repeated some of the complaints made earlier. The hearing sought by Complainant was one before an impartial person who at the conclusion of the hearing would make a recommendation to the Activity on the appropriate action to be taken.

On June 21, 1971 the Respondent wrote a letter to Complainant transmitting therewith a copy of a memorandum of the same date from the Technician Personnel Officer to Army and Air Technicians of the Georgia National Guard. The letter states that Respondent had been advised by the National Guard Bureau that the resolution adopted by the Adjutants General Association had not yet been adopted by the Bureau and that, therefore, paragraph 2-5 of the regulations still applied as the policy with which he must comply; it stated that the accompanying memorandum stated that policy. It stated also that he felt it inappropriate to have the requested hearing since the issue could not be resolved at the state level, and that further action by Complainant should be taken up with the Chief of the National Guard Bureau in Washington.

The accompanying memorandum from the Technician Personnel Officer set forth the conditions in which the wearing of the uniform would be excused. These were when engaging in civil functions such as addressing a civic organization, when working only part of a workday and on leave for the remainder to attend to personal matters, when on official travel by private conveyance (the purpose of this exception being to avoid being conspicuous such as when on a "skyjack" mission), and certain other conditions.

On June 24, 1971 Mr. Bagley, as Acting State Chairman, wrote to Respondent again stating that he had been directed to file a grievance against Respondent on the uniform issue, again requesting a formal hearing, and asserting that the denial of the hearing was in "direct conflict with edicts of the Secretary of Labor and E. O. 11491." There was no further specification of what edicts conflicted with the denial. He stated also that it was his duty in accordance with "my National directives and the Labor Department" to advise that unless Complainant was granted the formal hearing it would proceed with an unfair labor practice charge at the end of thirty days.

On June 30, 1971 the Adjutant General replied that its letter of June 21 denying the hearing was in compliance with paragraph 2-5 of the National Guard Regulations, that that letter had advised complainant to communicate directly with the National Guard Bureau if it desired to persist with the issue, and that he could not understand how Complainant could believe that his compliance with a

regulation of higher authority could constitute an unfair labor practice. He added that since Complainant had indicated, after publication of the policy (on June 21) on wearing the uniform, that certain individual problems had arisen, Complainant should submit a grievance on behalf of the individuals.

On July 12, 1971 Complainant replied that it could not accept the contents of Respondent's letter of June 30. It stated that it was not aggrieved by paragraph 2-5 but at the embarrassments and hardships resulting from being required to be in uniform. It continued that the Technicians were civilian employees and should not, while working as such, be subject to military protocol. It argued that without a formal hearing it could not obtain an unbiased opinion and solution. It repeated some of the embarrassments the men had suffered and stated that Technicians in some other states wore civilian clothes. It suggested that making the wearing of the uniform optional would bring benefits to Respondent that would far outweigh the minor problems that would result, and stated it was awaiting Respondent's reconsideration of the problem and again requested a formal hearing.

On July 23, 1971, the Technician Personnel Officer advised the Presidents of the Aaron B. Roberts and Savannah Chapters that he had been directed by the Adjutant General to invite them and the other officers of the Chapters to a "Formal Discussion" to discuss grievances pertaining to personnel policies and practices and other matters affecting working conditions.

As noted above, the Complaint was executed July 24 and filed July 26, 1971. The Area Administrator made an investigation of the Complaint in the course of which he wrote on July 26, 1971 to the Respondent asking his position concerning the Complaint, and on July 28, 1971 to the Complainant asking certain questions.

On July 28, 1971 the Respondent replied stating, inter alia, that National Guard Regulations (¶2-5) required the wearing of the uniform by Technicians while performing duties and vested the Adjutants General with restricted latitude to determine when wearing of the uniform would not be appropriate, and that his letter of June 21, 1971 implemented that requirement; that he had been advised by the National Guard Bureau that wearing the uniform is not a negotiable matter and that his action implementing the regulation was not a grievable matter and that because of that ruling by the Bureau, he had denied the request for a formal hearing and could find no requirement for a formal hearing.

On August 6, 1971 the Complainant responded to the Area Administrator's inquiry of July 28. It stated that it disagreed with the Respondent's position concerning the Respondent's latitude under paragraph 2-5 of the Regulations, and that Complainant was entitled to the hearing it requested under Federal Personnel Manual Letter 771-3, subpart C.

On July 28, 1964, the National Guard Bureau had issued a memorandum to All Adjutants General providing that each Adjutant General should review his existing grievance procedures to insure that they were current and adequate. The Respondent had not prescribed such procedures and, as noted above, the parties did not have a collective bargaining agreement. On August 3, 1971, Respondent's Technician Personnel Officer prescribed a grievance procedure denominated "interim" until an agreement should be negotiated for such matters. Theretofore grievance negotiations, including negotiations concerning the wearing of the uniform, had been informal without following a prescribed procedure.' There is no evidence that the grievance procedure of August 3, 1971 was ever used by Complainant, and some evidence it was not used.

On July 29, 1971 the parties had had negotiations pursuant to Respondent's invitations of July 23. On August 6, 1971 Complainant wrote to Respondent expressing appreciation for the discussions of July 29 and expressing the hope Respondent would resolve the issue.

The Area Administrator made his report to the Regional Administrator.4/ There followed the procedural steps set forth in the second and third paragraphs of the Statement of the Case, supra, culminating in the hearing that was held February 9, 1972.

The Hearing

The Complainant introduced additional evidence at the hearing in the nature of testimony and exhibits, most of it pertaining to the hardships of wearing the uniform, but irrelevant to the Complaint which complained only of the denial of a formal hearing. The Respondent introduced some exhibits but no testimony.

The Complainant, although it was the collective bargaining representative of the Technicians, did not seek to negotiate a collective bargaining agreement to resolve its disagreement about the compulsory wearing of the uniform because at the time it was engaged in a representation dispute. Instead, it sought to remedy the situation by processing it as a grievance. The principal portion of that processing is described above.

Most of the testimony adduced by the Union at the hearing pertained to the inappropriateness of and the hardships resulting from the requirement that the Technicians wear the uniform when on duty. These ranged from the embarrassments, indignities, and harassment inflicted on the Technicians that could be inflicted because they

4/ See 29 C.F.R. §203.5.

wore the uniforms of enlisted men, to the expense of such requirement, and the discomfort and physical hazard. The witnesses complained also that the Technician service was losing its younger men because of the military limitation on wearing long hair impinging on their freedom of expression, that when required to go abroad they were given less comfortable and less commodious living quarters because in uniform than they would have been given as civilians, and that as enlisted men their promotion was more limited. Also, Technicians in other branches of the service, under different command, were not required to be in uniform.

The Activity stated that it was addressing itself only to the charge in the Complaint that ACT was denied a formal hearing before an impartial hearing officer and such denial constituted a violation of Section 19(a)(6). It objected to the evidence described in the preceding paragraph on the ground that it was not the subject of the Complaint, and stated that it would not cross-examine the witnesses on those grievances because they were not relevant to the Complaint. The objection was overruled for the limited purpose of showing the subject matter of the requested hearing.

Although some of the Technicians want to wear the uniform, the great majority do not. All current dissatisfactions among the Technicians stem from the requirement of wearing the uniform; if the Activity would yield on that issue a Union spokesman (the current President of the Aaron B. Roberts Chapter) is of the view there would be nothing else for the Union to do. The Union's chief witness thought it inappropriate for the Respondent to consult with other Adjutants General on the subject, but thought it proper for the Union to give him time to do so. The Union's witnesses complained that Respondent had not prescribed a grievance procedure although, they thought, National Guard Bureau regulations required him to do so. ACT's President argued that the absence of a grievance procedure denied the Union its right to represent the employees. Union witnesses disagreed, as Complainant had in correspondence, with the Respondent's position concerning the limitation on his authority to relieve the men from the obligation to wear the uniform.

Discussion

The Complaint charges one violation of the Order by the Respondent, a refusal to grant a "Formal Hearing" before a hearing officer to whom its membership could present their case, and charges that such refusal constituted a violation of Section 19(a)(6) of the Order.

Section 19(a)(6) provides that management subject to the Order shall not "refuse to consult, confer, or negotiate with a labor organization" as required by the Order.

Section 10(e) of the Order provides, with respect to consulting and conferring, that: "The labor organization shall be given the opportunity to be represented at formal discussions . . . concerning grievances . . . or other matters affecting general working conditions . . ." Section 11(a) provides, with respect to the negotiation of agreements, that the parties shall confer in good faith "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 . . ."

The parties did not have a negotiated grievance procedure. This is stated in the Complaint itself. Indeed, they did not have any negotiated agreements, so there can be no questions of refusal to follow an agreed procedure.

When the underlying issue in this case arose, ACT did not seek a negotiated agreement to resolve it because at the time it was involved in a representation dispute. That representation dispute resulted, on July 12, 1971, in the direction of an election. The record in this proceeding does not show when the election was held, but all are in agreement that Complainant is the collective bargaining representative and it was so recognized before the dispute and under Executive Order 10988.

The dissatisfactions arising from the compulsory wearing of the uniform did not give rise to a refusal to bargain. The Union concedes that there were "fairly large amounts of correspondence and contact." The record fully supports that statement. The Complaint does not charge a refusal to consult except insofar as the "formal hearing" was denied. When the Union advised Respondent that individual grievances had arisen from the uniform requirement, Respondent advised the Union that they should be presented as such. When the Union failed to request a meeting on that subject, Respondent invited the officers of ACT's two chapters involved to a "Formal Discussion" on the subject. This was in full compliance with Section 10(e) of the Order. Such a meeting was had, and Complainant expressed appreciation for it.

The parties disagreed on whether the grievance concerning the compulsory wearing of the uniform was negotiable. Section 11(c)(2) of the Order provides that such a disagreement, not involving an interpretation of a controlling agreement, could be referred to the head of the agency for determination. Complainant did not avail itself of that step, although repeatedly invited by Respondent to do so. This was not a violation of Section 19(a)(6) by Respondent. Furthermore, the Union's Complaint does not charge a refusal to consult except as

such a refusal can be found in the refusal to grant the requested "formal hearing" which was wanted, the Union said at the hearing, to air the embarrassments, indignities, and expense resulting from the uniform requirement, before an impartial person who would make a recommendation concerning it.

In the private sector it is held that a refusal to arbitrate, even if such a refusal is in violation of contract, is not of itself a refusal to bargain in good faith or an unfair labor practice. 5/ Even a refusal to participate in mediation does not of itself constitute a refusal to bargain in good faith. 6/ This question does not appear to have been decided under the Executive Order, but the principle of such holdings in the private sector is sound. Whatever actionable wrong, if any, such refusals may be, they do not of themselves constitute a refusal to consult or negotiate so long as there is reasonable consultation and negotiation. In this case there is nothing else to indicate a refusal to consult. On the contrary, the record shows a willingness by the Activity to consult and discuss at all reasonable times on the underlying issue, and even the initiation of conferences by the Activity. But the Complaint in this case charges only a violation of Section 19(a)(6), a refusal to consult or negotiate, and such charge is not substantiated by showing a refusal to submit the disagreement to an impartial person for a recommendation.

The same result is reached when the situation is looked at from the point of view of the Union's position that the failure of Respondent to prescribe a grievance procedure until August 3, 1971 deprived it of the right to represent the Technicians. Assuming that directions from the National Guard Bureau imposed on Respondent the duty to prescribe such a procedure, a matter we need not decide, the failure to comply with such directions was not the unfair labor practice of refusing to consult. As observed above, there was consulting aplenty. If such failure to prescribe procedures was a wrong, it was not the wrong charged in the Complaint.

A similar result is reached with respect to the Union's contention that it was entitled to the requested hearing under Federal Personnel Manual, 771-3, Subpart C.

5/ Atlantic Research Corp., 144 NLRB 285, 54 LRRM 1049, 1050 (1963); Hortex Manufacturing Company, 147 NLRB 1151, 56 LRRM 1374 (1964); Central Rufina, 161 NLRB 696, 63 LRRM 1318, 1320 (1966); Central Illinois Public Service Co., 139 NLRB 1407, 51 LRRM 1508, 1510 (1962).

6/ Midas International Corporation, 150 NLRB 486, 58 LRRM 1108 (1964).

First, F.P.M. Part 771-3, Subchapter 2, provides for appeals in discipline grievances including a hearing before an impartial examiner, but that subchapter provides expressly that it does not apply to National Guard Technicians. Section 2-1.a.(7). Subchapter 3 applies to grievances concerning matters of dissatisfaction to an employee and within the control of agency management, but it provides that it does not cover the content of published agency policy. 7/ Paragraph 2-5 of NGR 690-2, ANGR 40-01 is a published agency policy.

The Regulations of the Civil Service Commission, Part 771, have a Subpart C to Part 771, and it applies to employee grievances and establishes procedures including a reference to an examiner. 8/ But it provides that Subpart C does not apply to "The content of published agency policy." 9/ As noted, paragraph 2-5 does state published agency policy, and Respondent's action thereunder was pursuant to his understanding of its content. Complainant's disagreement is over that content.

Second, even if those provisions were applicable to the instant situation, we would have at most a violation of regulations, not a refusal to negotiate, and a refusal to negotiate is the only charge in the Complaint. What remedy may be available for a violation of applicable regulations is not a matter we need here decide. Here we have not had a refusal to negotiate.

The Complainant argues that NGR 690-2, ANGR 40-01, ¶2-4.b., subparagraph (18) has pertinence, but in the absence of a brief it is not clear whether it believes that subparagraph to be pertinent to Respondent's authority to relieve the Technicians of the obligation to wear the uniform or to his authority or obligation to grant the requested hearing. That paragraph provides that the Adjutant General of each state is responsible for:

> "(18) Operating programs which will maintain essential employee services, stimulate and recognize technician accomplishments through effective promotion and administration of the incentive program, provide information to technicians on their responsibilities and obligations as Federal employees and concerning their privileges and rights, including the right of appeal and the procedures for requesting review of grievances and complaints."

7/ Sections 3-2a, 3-2(b)(2), 3-17(A).

8/ 5 C.F.R., Part 771; §771.310; as amended 35 F.R. 14918, 14922 (September 25, 1970).

9/ Section 771.302(b).

There cannot reasonably be found in such provision authority to waive what the Adjutant General considered positive requirements of other provisions of the regulations, and assuredly even if it contains such authority a refusal to exercise it cannot be considered a refusal to confer. Nor can it reasonably be found to contain a provision requiring the granting of a hearing before an impartial officer on an unsatisfied grievance, and even if it could be found to contain such requirement a failure to comply with it could not be considered a refusal to confer. As we have seen, here there was an abundance of conferring, and none of it could be considered in bad faith nor is anyone accused of bad faith.

Complainant's quandary was that it was seeking a change in working conditions, a change to a status that so far as the record shows had never existed, but felt inhibited from seeking to accomplish the change by obtaining it in a collective bargaining agreement because of the pending representation dispute. Hence it sought to persuade the Respondent to make the change, but not to agree to make it, by presenting the absence of the change as a grievance. Walking this metaphysical tightrope has led Complainant to grasping at straws to find the unfair labor practice of refusing to confer. The number and variety of these straws do not add to their cumulative substance. The Union sought to convert the hearing before the Examiner into the hearing sought from and denied by the Respondent, but a hearing on a charge of refusing to bargain cannot properly be converted to such purpose, however sincere the grievants appeared at the hearing.

Findings of Fact

1. The Respondent is the head of an "Activity" as defined in Section 201.14 of the Regulations of an "Agency" as defined in Section 2(a) of the Order.

2. The Complainant is a labor organization that is the duly accredited collective bargaining representative under the Order of the Technicians of the Activity. It does not have and has not had a collective bargaining agreement with the Activity.

3. Technicians are required to be members of the National Guard to be eligible for employment as such.

4. Regulations of the Agency, as interpreted and applied by the Activity, required the Technicians to wear the military uniform appropriate to their rank when on duty with exceptions not here pertinent.

5. The Technicians felt that the requirement of wearing the uniform subjected them at times to unnecessary discomfort, embarrassments, expense, inconveniences, and other burdens. Sometime prior to February 24, 1971 Complainant, on behalf of the Technicians at Dobbins Air Force Base at Atlanta, Georgia and at Travis Field, Savannah, Georgia, sought relief from such requirement from the Base Detachment Commanders and sought making the wearing of the uniform optional with the individual Technician. Relief was not obtained from the Base Detachment Commanders.

6. On February 24, 1971 Complainant sought relief from Respondent, the head of the Activity for the State of Georgia. There followed extensive correspondence and other communications and conferences between the Union and the Activity in the course of which the Activity took the position that the scope of the Respondent's discretion under regulations of the Agency did not permit the granting of the requested relief and that further efforts to obtain such relief should be sought from the Agency. Complainant did not make such efforts with the Agency.

7. In the course of these proceedings the Complainant did not seek a collective bargaining agreement to obtain the relief sought because a dispute was pending over whether it was the choice of the majority in the appropriate unit to be their representative. Instead, it presented the matter as a grievance and sought relief from the grievance.

8. When satisfaction of the grievance was not obtained from Respondent the Complainant requested a formal hearing before an impartial hearing officer. Such request was refused.

9. The Complainant filed a Complaint charging that the refusal to grant the requested hearing constituted a violation of Section 19(a)(6) of Executive Order 11491.

10. At no time did Complainant request and Respondent refuse to consult or confer concerning the requirement of wearing the uniform.

11. At the hearing in this proceeding the Complainant introduced testimony concerning alleged misconduct other than the denial of the requested hearing. The Respondent objected to such testimony on the ground that it was irrelevant to the Complaint. The objection was overruled for the limited purpose of showing what would have been the subjects of the requested hearing. The Respondent did not address itself at the hearing to the other alleged misconduct.

Conclusions of Law

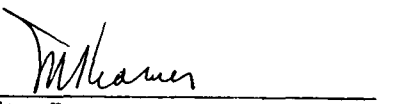
1. There was no obligation on the Respondent to grant the requested hearing.

2. The refusal to grant the requested hearing did not constitute a refusal to consult, confer, or negotiate as required by the Executive Order.

3. The Complaint that the Respondent violated Section 19(a)(6) of the Order has not been sustained.

Recommendation

The Complaint should be dismissed.



Milton Kramer
Hearing Examiner

Dated at Washington, D. C.

this 18 day of April, 1972.

500-836 O - 73 - 26

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

DEPARTMENT OF THE ARMY, HEADQUARTERS,
U.S. ARMY TRAINING CENTER ENGINEER,
FORT LEONARD WOOD, MISSOURI
A/SLMR No. 183

The Petitioner, National Federation of Federal Employees, Local 1271 (NFFE) sought to represent a unit of "Fire Fighters" including those classified as Supervisory Fire Fighters (General) (GS-6) (Crew Chiefs). The incumbent intervenor was International Association of Fire Fighters, Local F-108, AFL-CIO, (IAFF). The parties stipulated that the unit was appropriate, but the Activity, in opposition to the NFFE and the IAFF, sought to exclude Crew Chiefs as supervisors.

The Assistant Secretary found that the Crew Chiefs were not "supervisors" within the meaning of the Order and, therefore, should be included in the Fire Fighter unit. In this respect, he noted that they clearly have no authority to hire, transfer, suspend, layoff, recall, dispose of formal grievances, promote or discharge employees; they have minimal control over assignments; their activities are supervised closely by the Assistant Chiefs; and that although certain Crew Chiefs designated as "House Captains" are responsible for certain administrative duties, such duties are routine in nature. The Assistant Secretary noted also that while some Crew Chiefs have certain evaluation and recommendation functions they do not effectively evaluate employees in that such evaluations and recommendations are subject to review and change by the Assistant Chiefs and the Fire Chief and, generally, the employees are rated "satisfactory."

In these circumstances, the Assistant Secretary directed that an election be held in a unit of all Fire Fighters, including employees classified as Supervisory Fire Fighters (General) (GS-6) (Crew Chiefs), if in the appropriate Area Administrator's view, the NFFE's showing of interest was adequate with the addition of Crew Chiefs in the claimed unit.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY, HEADQUARTERS,
U.S. ARMY TRAINING CENTER ENGINEER,
FORT LEONARD WOOD, MISSOURI

Activity

and Case No. 62-2905-RO

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 1271
WAYNESVILLE, MISSOURI

Petitioner

and

INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, LOCAL F-108, AFL-CIO
RICHLAND, MISSOURI

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Robert G. Sloan. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed as modified below.1/

1/ The Hearing Officer rejected the tender by the International Association of Fire Fighters, Local F-108, AFL-CIO, herein called IAFF, of a copy of the Civil Service Commission's Position-Classification Standards - GS-081 with regard to the classification of "Crew Chief." I conclude that this document, for the limited purpose for which it was tendered, is relevant to the issues before me. Accordingly, I reverse the Hearing Officer's ruling in this regard and receive the document into the record. Because, in reaching the decision in this case, I have considered the entire record, including the document in question, the Hearing Officer's rejection of the document at the hearing was not considered to constitute prejudicial error.

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

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

2. The National Federation of Federal Employees, Local 1271, herein called NFFE, seeks an election in a unit of all General Schedule Fire Fighter employees in the Department of Army, Headquarters, United States Army Training Center Engineer, Fort Leonard Wood, Missouri, including Crew Chiefs, but excluding Fire Chiefs, Assistant Chiefs, temporary employees hired for fire prevention, managerial officials, employees engaged in Federal personnel work other than in a clerical capacity, professional employees, supervisors, guards, and all other General Schedule employees employed at Fort Leonard Wood, Missouri.2/

While not contesting the appropriateness of the claimed unit, the Activity contends, in opposition to the NFFE and the IAFF, that employees classified as Supervisory Fire Fighters (General), commonly referred to and herein called Crew Chiefs, are supervisors within the meaning of Section 2(c) of the Executive Order and should be excluded from the unit.3/

The United States Army Training Center Engineer, Fort Leonard Wood, Missouri, has the mission of administering, operating and maintaining all installation facilities and real estate. Its primary objective is the establishment and operation of an effective training program to qualify personnel for advanced individual training or for assignment to active Army units and reserve components. The Fire Division is responsible for the Activity's fire prevention and protection.

The Fire Division has a total complement of approximately 41 individuals. It is headed by a Fire Chief (GS-10). Working under him are two Assistant Fire Chiefs (GS-8), eight Crew Chiefs (GS-6)4/, ten Fire Fighters (General) (GS-5), nineteen Fire Fighters (General) (GS-4), and one Fire Fighter (General) (GS-3).5/

There are two fire stations at the Activity which are manned by civilian employees and a third station which is operated solely by the military.6/ Stations No. 1 and 2 are approximately 4 miles apart and are operated on a 24-hour basis. The entire complement, with the exception of the Fire Chief, works a total of 72 hours per week, working three 24-hour shifs per week.7/ The employees receive a 25 percent pay differential for overtime, holiday, and night work. A shift crew usually consists of a Crew Chief and three or four Fire Fighters. Each station has two Crew Chiefs, one of whom is designated "Station" or "House" Captain on a rotating basis every three months. In the event that one of the Crew Chiefs is not available (generally because of leave) one of the driver-operators is designated to act in his place.

The physical facilities of Station No. 1, which is designated as the "Main House", Building No. 386, consist of a bunk room, latrines and showers, kitchen, locker area, watch room, hose tower, fire extinguisher room and the apparatus area. An area is set aside for the Fire Chief which he shares with the Assistant Chief. This area contains an office, bedroom, latrine and shower, and supply room, and is not available to the Fire Fighters and Crew Chiefs except with permission on an emergency basis. Station No. 2, housed in Building 5001, has a bunk room, latrine and showers, kitchen, office, watch room, repair room, furnace room and apparatus area. Stations No. 1 and 2 engage essentially in the same functions except that Station No. 1 receives emergency work orders and performs certain extra operations. All the Fire Fighters and Crew Chiefs at each of the two fire stations share the same facilities, have their lockers in a common area, and sleep in the same quarters.

The Fire Chief is both the administrative and technical head of the Fire Division. The Assistant Chief on duty is responsible for the efficient operation and management of the fire stations and, in this connection, spends a substantial number of hours in each station during a 24-hour shift. In addition, on almost a daily basis, the Fire Chief visits each station.

2/ The unit appears as amended at the hearing.

3/ At the outset of the hearing, the NFFE agreed with the position of the Activity with regard to the exclusion of Crew Chiefs from the petitioned for unit as supervisors. However, at the close of the hearing, the NFFE amended its petition to include Crew Chiefs in the petitioned for unit, stating that although the Crew Chief's job description indicates that it is a supervisory position, the testimony adduced at the hearing established that they were nonsupervisory employees and properly should be included in the unit.

4/ The organizational chart introduced into evidence by the Activity indicated that 10 Crew Chiefs were employed by the Activity. However, the evidence adduced at the hearing reveals that at the date of the hearing there were only 8 employees employed as Crew Chiefs.

5/ On May 21, 1970, the IAFF was certified as the exclusive representative of all nonsupervisory General Schedule Fire Fighter employees of the Activity, excluding, among others, Crew Chiefs (GS-6). There is no evidence of any negotiated agreement between the IAFF and the Activity.

6/ There is no contention that Station No. 3 be included as part of the petitioned for unit.

7/ The Fire Chief works 56 hours per week--four 8-hour days and one 24-hour shift.

The evidence discloses that the day-to-day activity of the crews in the fire stations follow a fairly routine pattern under standard operating procedures. Thus, the Fire Chief sets up a work schedule on an annual basis from which the Assistant Chief prepares a monthly schedule. The daily schedule is established by the Crew Chiefs, and they may shift their personnel on a daily basis to balance manpower needs. However, any reassignment of a Fire Fighter to fill a shortage is determined by the Assistant Chief.

While some training exercises are handled by the Crew Chiefs, the plans for such exercises are prepared from published manuals. Moreover, some training also is performed by Fire Fighters (GS-5) and occasionally GS-4s who have special expertise in certain areas. The record reveals in this regard that the teaching role of the Crew Chiefs, as well as the Fire Fighters (GS-5), apparently is derived more from the level of their experience than from their job classifications.

The assignment of equipment is the responsibility of the Assistant Chief. A Crew Chief is assigned to each vehicle and is responsible for that vehicle and the personnel assigned to it. While the record reveals that a Crew Chief makes a daily equipment check with his crew, it reflects also that the check is highly routine in nature and that the Fire Fighter employees require little or no supervision with regard to the maintenance of their equipment. Further, while it is the responsibility of the "House Captain" to see that the overall house details are attended to, it is not uncommon for the "House Captain" and other Crew Chiefs to engage in the various routine housekeeping functions at the stations.

Crew Chiefs involved in a fire emergency accompany the crew on the equipment to the site of the alarm, generally along prearranged routes. The evidence reflects that a Crew Chief's responsibility at a fire is to oversee the operations before the arrival, usually within minutes, of the Fire Chief and Assistant Chief. At a fire, Crew Chiefs work with the crew who generally are trained and experienced in performing their job assignments.

The record reveals that Crew Chiefs have no role in hiring or firing employees. While the evidence indicates that Crew Chiefs are involved in the preparation of certain employee appraisal reports and promotion recommendations, it is clear that such reports and recommendations are subject to review by the Assistant Chief and the Fire Chief, both of whom are empowered to make changes. In this regard, the record reflects that the Crew Chiefs exercise little, if any, independent judgment in the performance of these tasks and that their recommendations are not independently effective. Moreover, approximately 90 percent of all ratings are "satisfactory."8/ The record indicates also that

8/ The testimony of one Crew Chief indicated that he has never evaluated any employee as "outstanding" or "unsatisfactory."

Crew Chiefs do not possess effective authority to discipline, and that any potential disciplinary action must be discussed with the Fire Chief if it is to be initiated. Further, Crew Chiefs have not participated in the processing of "formal" grievances.

Based on the foregoing, I find that Crew Chiefs are not supervisors within the meaning of Section 2(c) of the Executive Order. Thus, Crew Chiefs clearly have no authority to hire, transfer, suspend, layoff, recall, dispose of formal grievances, promote or discharge employees. The evidence further establishes that their role in effectuating the job assignments is minimal and that their activities are supervised closely by the Assistant Chiefs. Additionally, the evidence establishes that Crew Chiefs do not have the authority to recommend effectively personnel actions and that annual performance ratings, prepared by the Crew Chiefs, are subject to review and change by the Assistant Chiefs and the Fire Chief. Moreover, generally, employees are rated "satisfactory." While the "House Captain" is responsible for certain administrative duties involving the completion of various forms, the evidence establishes that many of these are routine in nature. Under these circumstances, I find that Crew Chiefs do not possess the indicia of supervisory status as provided in Section 2(c) of the Executive Order and, therefore, should be included in any unit found appropriate for the purpose of exclusive recognition.9/

I find also that the following employees share a clear and identifiable community of interest and, therefore, constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of Executive Order 11491:

> All General Schedule Fire Fighter employees, including Supervisory Fire Fighters (General) (Crew Chiefs), in the Department of the Army, Headquarters, United States Army Training Center Engineer, Fort Leonard Wood, Missouri, excluding Fire Chiefs, Assistant Chiefs, employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, management officials, and supervisors and guards as defined in the Order.10/

9/ Accord, United States Department of the Navy, United States Naval Weapons Station, Yorktown, Virginia, A/SLMR No. 30; Federal Aviation Administration, Bureau of National Capital Airports, A/SLMR No. 91; Department of the Navy, United States Naval Weapons Center, China Lake, California, A/SLMR No. 128; and Department of the Navy, Mare Island Naval Shipyard, Vallejo, California, A/SLMR No. 129.

10/ The amended petition specifically excluded "temporary employees hired for fire prevention", and at the hearing the parties stipulated that no employees in such a classification are employed by the Activity. Noting that the record does not set forth any facts as to this category of employees and the fact that there are no such employees currently employed by the Activity, I will make no eligibility findings in this regard.

11/

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the National Federation of Federal Employees, Local 1271; or by International Association of Fire Fighters, Local F-108, AFL-CIO; or by neither.

Dated, Washington, D.C.
August 3, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

11/ The record in the subject case is unclear as to whether the inclusion in the petitioned for unit of Supervisory Fire Fighters (General) (GS-6) (Crew Chiefs) renders inadequate the NFFE's showing of interest. Accordingly, before proceeding to an election in this case, the appropriate Area Administrator is directed to reevaluate the showing of interest. If he determines that, based on the inclusion of the Supervisory Fire Fighters (General) (GS-6) (Crew Chiefs), the NFFE's showing of interest is inadequate, the petition in this case should be dismissed.

August 4, 1972

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

FEDERAL AVIATION ADMINISTRATION,
NEW YORK AIR ROUTE TRAFFIC CONTROL CENTER
A/SLMR No. 184

The subject case involved objections to an election held on June 29 and 30, 1971, filed by the Federal Aviation Science and Technological Association, Local R2-8, National Association of Government Employees (Petitioner).

The Regional Administrator overruled certain of the objections and referred certain other objections to the Assistant Secretary for ruling. The objections referred to the Assistant Secretary raised the question of whether either of the following actions warranted setting aside the election: (1) the Activity's prohibiting of the posting of campaign propaganda by the Petitioner on a bulletin board at the facility; and (2) the Activity's permitting of the Professional Air Traffic Controllers Organization, Inc.(PATCO), which was not a party to the election, to use space within the employees' cafeteria to campaign against the Petitioner and to post and distribute campaign propaganda on the Activity premises.

The Assistant Secretary determined that while an agency should not police or censor campaign propaganda, it, nevertheless, has the right to ensure that literature which is posted on its property is not violative of any law. In the particular circumstances, and noting that the Petitioner had ample opportunity to and in fact did communicate with the voters by means other than use of the Activity's bulletin board, the Assistant Secretary found that the Activity's conduct with respect to the Petitioner's use of its bulletin board did not warrant setting aside the election.

The Assistant Secretary further concluded that the campaign against the Petitioner by employees who were officials of the PATCO did not constitute conduct which would warrant setting aside the election inasmuch as such conduct was not assisted or encouraged by the Activity. The Assistant Secretary noted that the fact that the PATCO had been barred from appearing on the ballot because of its prior unfair labor practices did not convert the legitimate representation activities of the pro-PATCO employees into conduct which would warrant setting aside of the election. Such activities were conducted exclusively by employees in the bargaining unit. In the Assistant Secretary's view, such employee had the right to campaign for or against the Petitioner notwithstanding the fact that the employees involved were officers of another labor organization and notwithstanding the fact that the PATCO could not participate in the election by appearing on the ballot.

Accordingly, the Assistant Secretary overruled the Petitioner's objections and returned the case to the Regional Administrator for further appropriate action.

A/SLMR No. 184

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL AVIATION ADMINISTRATION,
NEW YORK AIR ROUTE TRAFFIC CONTROL CENTER

Activity

and Case No. 30-3213 E.O.

FEDERAL AVIATION SCIENCE AND TECHNOLOGICAL
ASSOCIATION, LOCAL R2-8, NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES

Petitioner

DECISION ON OBJECTIONS

This matter is before the Assistant Secretary pursuant to Regional Administrator Benjamin E. Naumoff's Order transferring certain objections to the election in the subject case to the Assistant Secretary of Labor, pursuant to Sections 202.20(e) and 205.5(b) of the Rules and Regulations. 1/

Pursuant to the provisions of an Agreement for Consent or Directed Election approved on June 7, 1971, an election by secret ballot was conducted in the captioned proceeding on June 29 and 30, 1971, under the supervision of the Labor-Management Services Administration Area Administrator, New York, New York, among the employees in the appropriate unit. At the conclusion of the balloting, the parties were furnished with a tally of ballots which showed that of approximately 720 eligible voters, 548 cast ballots of which 83 were for the Petitioner and 465 were cast against exclusive recognition. There were no challenges.

On July 6, 1971, the Petitioner filed timely objections to the conduct of the election. After investigating the matters raised by the objections, the Regional Administrator, on September 30, 1971, issued and duly served on the parties his Report and Findings on Objections, in which he determined that four of the seven stated objections were without merit. The Regional Administrator transferred the remaining objections to the Assistant Secretary as, in his view, such objections raised substantial questions of policy which had not been previously considered by the Assistant Secretary. 2/

In the objections in issue, the Petitioner alleges in substance that the Activity interfered with the employees' free choice in the election (1) by prohibiting the posting of certain material by the Petitioner on the bulletin board located on the Activity's premises and (2) by allowing the Professional Air Traffic Controllers Organization, Inc., herein called PATCO, to use space within the employees' cafeteria to campaign against the Petitioner and allowing the PATCO to post and distribute campaign propaganda on the Activity's premises although the PATCO was not a party to the election.

As to the first allegation, the evidence revealed that on either June 23 or June 24, 1971, Russell Wexler, the president of the Petitioner, posted a leaflet on the Petitioner's bulletin board 3/ which criticized the PATCO's attempt to intervene in the election proceedings. 4/ On June 25, 1971, the Activity advised Wexler that he had to remove the previously posted campaign literature because John Lapine, an employee and president of the PATCO local at the facility, had objected to some reference in the literature

1/ Apparently, the Regional Administrator's Order transferring the objections was lost in the mail. In these circumstances, the matters involved herein were not brought to the attention of the Assistant Secretary until after the issuance of the Decision and Direction of Election in Federal Aviation Administration, Department of Transportation, A/SLMR No. 173. Inasmuch as the disposition herein does not change the decision rendered in the aforementioned case, I find that there is no need to modify that decision.

2/ Neither of the parties filed exceptions to the Regional Administrator's Report and Findings on Objections.

3/ The Petitioner and the PATCO had formal recognition status and, as a result, both had bulletin board privileges.

4/ The PATCO was prevented from participating in the election in accordance with the Assistant Secretary's Decision and Order in Professional Air Traffic Controllers Organization, Inc., A/SLMR No. 10, wherein it was determined that the PATCO had committed certain unfair labor practices and, as part of the remedy for such unfair labor practices, the PATCO was prohibited from utilizing the procedures available to labor organizations under the Executive Order until it complied with the Decision and Order.

to himself and other employees. When Wexler attempted to post another leaflet on that same day, management refused him permission on the grounds that it contained statements which were detrimental to the PATCO's representatives. 5/

Thereafter, on June 29, 1971, the first day of the election, Wexler posted campaign material on the bulletin board without objection from the Activity. This latest literature listed the accomplishments and merits of the Petitioner and, in the Petitioner's view, did not in any way disparage the PATCO's representatives.

The Activity maintains that in restricting the campaign propaganda that could be placed on the Petitioner's bulletin board it was attempting only to prevent the posting of literature which could be considered "slanderous [sic]." In my view, an agency should not police or censor campaign propaganda by a labor organization. However, an agency does have the right to ensure that literature which is posted on its property is not violative of any law.

In this case, the evidence presented by the Petitioner establishes that the sole limitation placed on the circulation of the Petitioner's campaign propaganda was the restriction, on only two occasions, placed on the use of its bulletin board located on Activity premises. The evidence further establishes that the Petitioner had ample opportunity to, and did in fact, communicate with the voters by other means including the insertion of campaign literature into the lockers of the air traffic controllers and the use of space within the employees' cafeteria on the days of the election for campaign purposes. In view of the foregoing, I find, without regard to whether or not the material in question was "libelous" and without regard to whether or not the Activity's restriction on the use of the bulletin board was justified, that such conduct on the part of the Activity would not warrant setting aside the election in this matter. Accordingly, I find no merit to this objection.

As to the remaining issues raised by the objections the evidence revealed that on June 19, 1971, John Lapine, who, as noted above, was an Activity employee and also the president of the PATCO local at the facility, distributed leaflets announcing a union meeting, the last line of which reminded the readers to "Vote No". About 150 of the leaflets were placed on a cigarette machine in the cafeteria for the employees to take. Lapine did not seek the Activity's permission to distribute the leaflets and there is no evidence that the Activity's supervisors were aware that Lapine had placed the leaflets in the cafeteria. On June 24, 1971, the Activity permitted

5/ The bulletin boards in question were enclosed by glass and, ordinarily, the doors to the bulletin boards were locked and access would be obtained only through Gerald Shipman, the Activity's personnel officer, whose permission was required for the posting of campaign material.

Lapine to post on the PATCO bulletin board a reprint from a newspaper, the Federal Times, which dealt with air traffic controller retirement legislation that was pending in Congress. The article had various lines underscored to emphasize the different versions supported by the PATCO and the Petitioner. Also, the article reported unfavorably on the future of the version supported by the Petitioner and the underscoring accentuated the fact that the Petitioner would include employees other than air traffic controllers under the retirement legislation, an objective opposed by the PATCO.

The evidence also revealed that a sign was posted on the PATCO bulletin board which declared that "a no vote is a PATCO vote." The sign was observed for the first time by the Petitioner's Local President Wexler on June 23 or 24, 1971. On the morning of June 25, after Wexler was told by the Activity that he had to remove the Petitioner's literature from the bulletin board, Wexler insisted that if the Petitioner's literature had to be removed, the PATCO's poster also should be removed. The PATCO's campaign literature consisting of the Federal Times reprint and the "Vote No" poster was removed subsequently from the bulletin board sometime during the afternoon or evening of June 25, 1971, approximately four days before the scheduled election. The record reveals that, thereafter, the Activity apparently prohibited the PATCO from any further use of the bulletin board for campaign purposes. 6/

On June 28, 1971, Lapine and a number of other employees distributed a leaflet on the platform at the rear entrance to the Activity's premises. The Activity's permission to distribute the literature was not sought and the distribution was halted temporarily by the Activity. However, the distribution was permitted to resume after the Activity was advised by its national director of labor relations that it was permissable for employees to distribute campaign literature as long as it was done in nonwork areas during nonwork hours. The leaflet in question consisted of three pages, the first of which mentioned the PATCO's petition for an election in a nationwide unit of air traffic controllers and also urged the employees to "Vote PATCO" by voting "No". The second page was the same as the Federal Times reprint which had appeared earlier on the PATCO bulletin board. The third page contained an attack on the Petitioner's performance in the congressional hearings on retirement legislation. It also urged the employees to "Vote No."

6/ It was the Activity's stated policy to prohibit the PATCO's use of the bulletin board and the Activity's other facilities for campaign purposes because the PATCO was not a party to the election. Regarding the PATCO's "no vote" poster, Shipman, who authorized its posting, stated he did so because it did not appear to be campaign material and because he was under the impression that the posting of such literature was prohibited only during the period when the voting was taking place. However, as noted above, after the Petitioner's president complained, the literature was removed.

On the morning of June 29, 1971, Lapine and some other employee representatives of the PATCO local set up a table in the employees' cafeteria with a "PATCO" sign which contained promotional material for the PATCO. The Activity's personnel officer, Gerald Shipman, observed the table at about 6:45 a.m. and stated that the table appeared to be the PATCO's campaign headquarters. As a result, he advised Lapine that he could not use the cafeteria for the distribution of campaign material but the latter refused to comply with his request to cease such conduct. Lapine asserts that he advised Shipman that his group was not distributing campaign material but had set up a recruiting table. Although Shipman did not ascertain what was being distributed, the material, as described by Lapine, consisted of applications for membership, the PATCO training manual for new employees, a pen, a pocket protector for holding pens and pencils. The last two items were imprinted with a statement urging employees to "Join & Vote PATCO Affiliated with MEBA (AFL-CIO)". In addition, the PATCO representatives exhibited a petition with the declaration "I cast a ballot in the election. If PATCO, NYARTCC Chapter had been on the ballot, I would have voted for it". Lapine earlier had mailed a leaflet to the PATCO members urging them to sign the petition.

On June 29, 1971, Shipman set forth the Activity's position in regard to PATCO's activities in the cafeteria in a letter addressed to Lapine. Such letter was handed to Lapine on the afternoon of June 29, 1971. The letter referred to conversations between Shipman and Lapine on June 28 and 29 and a previous letter in regard to restrictions placed on the posting of campaign material by PATCO. It reiterated the Activity's position that the PATCO was not a party to the election and, accordingly, could not be provided with facilities by the Activity for campaign purposes. In addition, the letter reiterated the fact that this policy also was applicable to the use of the cafeteria table for distribution of campaign literature and that Lapine had been so advised that morning when he was requested to remove the PATCO sign from the table and not to use it as a base for the distribution of literature.

The PATCO representative disregarded Shipman's letter and remained at the cafeteria table where they continued their activities during the voting hours on both days of the election. Shipman made no attempt to have them removed from the premises for the stated reason that he did not wish to provoke an incident which might affect the election.

The foregoing evidence clearly establishes that certain employees of the Activity, including officials of the PATCO local which held formal recognition at the Activity, engaged in a campaign during nonwork time in nonwork areas designed to encourage employees to vote against the Petitioner. The evidence also establishes that with the exception of permitting the posting of the "Vote No" sign and the reprint from the Federal Times on the PATCO bulletin board for a short period of time some four days before the election, the Activity did not assist or encourage the campaign against the Petitioner by the pro-PATCO employees. With regard to the conduct by pro-PATCO employees in the facility's cafeteria on June 29 and June 30, 1971, the

evidence shows that such conduct was engaged in by employees of the Activity in a nonwork area. I have stated previously that employees have the right to solicit or distribute literature in a representation context in nonwork areas. 7/ The fact that an employee also is an officer of a labor organization, in and of itself, would not detract from the rights emanating from his employee status under the Order. From the above-noted evidence, it is clear that the pro-PATCO employees were not given official status as a labor organization for campaign purposes and that the conduct in which they engaged emanated from their rights as employees to engaged in campaign activity during nonwork time in nonwork areas without interference from the Activity. Accordingly, as the campaign by the pro-PATCO employees was not assisted or encouraged by the Activity except to the limited extent noted above, and as the Activity did not accord the PATCO equivalent status with the Petitioner, I find that the campaign by the pro-PATCO employees does not constitute conduct which would warrant setting aside the election. 8/ I further find that the fact that the PATCO was prohibited from participating in the election in the subject case as part of the remedy for having violated Section 19(b)(4) of the Executive Order, as found in Professional Air Traffic Controllers Organization, Inc., cited above, does not convert the legitimate representation activities by the pro-PATCO employees into conduct which would warrant setting aside the election. Thus, all of the conduct in question was carried on by employees of the Activity, and no evidence was presented by the Petitioner that the pro-PATCO employees were aided or abetted by any officials of the PATCO other than those who were members of the bargaining unit in which the election was held. In my view, while the remedy in the unfair labor practice decision deprived the PATCO of its right under the Order to appear on the ballot, it did not affect the rights of the individual employees to express their union sentiment or to campaign for or against any organization. 9/

Based on the foregoing, I hereby order that the objections to the election in the subject case be overruled.

7/ See Charleston Naval Shipyard, A/SLMR No. 1

8/ This case is distinguishable from U.S. Department of the Interior, Pacific Coast Region, Geological Service, Menlo Park, California, A/SLMR No. 143, wherein the Activity formally sanctioned a campaign by a labor organization which was not a party to the election and accorded it the same status as that accorded the labor organization which was a party to the election.

9/ See Report on Ruling Number 32, dated June 14, 1971, wherein I ruled that "employees may not be prohibited from distributing literature based solely on the fact that it is unfavorable to a particular labor organization."

ORDER

IT IS HEREBY ORDERED that the objections in the above-entitled proceeding be, and they hereby are, overruled and that the case be returned to the Regional Administrator for appropriate action.

Dated, Washington, D.C.
August 4, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

August 7, 1972

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

THE DEPARTMENT OF THE TREASURY,
U.S. SAVINGS BONDS DIVISION
A/SLMR No. 185

The Petitioner, Local 3292, American Federation of Government Employees, AFL-CIO, (AFGE), sought an election in a unit of all General Schedule and Wage Board professional and nonprofessional employees at the Headquarters Office of the U. S. Savings Bonds Division, Department of the Treasury, located in Washington, D. C.

The Assistant Secretary found that a unit composed of General Schedule and Wage Board employees at the Headquarters Office was an appropriate unit for the purpose of exclusive recognition. In reaching this determination, he examined the Activity's operation and found that while both headquarters and field employees of the Savings Bonds Division clearly contributed to the accomplishment of the Activity's overall mission, their community of interest was essentially limited to this extent. In this regard, he noted principally the dissimilarity of job functions and goals of the headquarters and field employees, as well as infrequent job training contact between these two employee groups, divergent utilization of such training, limited direct supervision of field offices by headquarters staff, and minimal transfers between the headquarters and the field. Thus, because commonality between these employee groups in terms of job functions, working conditions, locations, immediate supervision, and interchange was limited, the Assistant Secretary concluded that the headquarters staff of the Savings Bonds Division shared a community of interest separate and distinct from the field office employees of the Division.

The Assistant Secretary found also that the Bond Sales Promotion Specialists in certain headquarters job classifications did not meet the criteria for professional employees set forth in Department of Interior, Bureau of Land Management, Riverside District and Land Office, A/SLMR No. 170; that certain other employees were management officials as stipulated by the parties; that certain secretaries were confidential employees; and that while some employees were supervisors, as stipulated by the parties, other employees who were stipulated to be supervisors, had, in fact, authority over only one employee and therefore were not supervisors within the meaning of the Executive Order.

The Assistant Secretary directed an election in the unit found appropriate.

A/SLMR No. 185

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

THE DEPARTMENT OF THE TREASURY,
U.S. SAVINGS BONDS DIVISION 1/

Activity

and

Case No. 22-2828

LOCAL 3292, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO 2/

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Leo A. Glunk. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 3/

Upon the entire record in this case, including the Activity's brief, the Assistant Secretary finds:

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

2/ The Petitioner's name appears as amended at the hearing.

3/ Following the filing of the representation petition in the subject case, seeking a unit of nonprofessional employees and requesting also that professional employees be allowed to vote at the same time and without a separate election procedure, for inclusion in the claimed unit, the Activity and the Petitioner, Local 3292, American Federation of Government Employees, AFL-CIO, herein called AFGE, attempted to execute a consent election agreement, notwithstanding their lack of agreement as to certain "professional" job classifications. They were of the view that any issues in this latter regard could be resolved by the challenged ballot procedures. The Area Administrator refused to approve the parties' consent election agreement, determining that a hearing was required to settle the professional issue.
(Continued)

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

2. The AFGE seeks an election in a unit of all General Schedule and Wage Board professional and nonprofessional employees at the Headquarters Office of the U. S. Savings Bonds Division, Department of the Treasury, located in Washington, D. C., excluding all employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, confidential employees, and supervisors and guards as defined in the Executive Order. 4/ The Activity agrees that the petitioned for unit is appropriate.

Unit Determination

As one of ten divisions within the Department of the Treasury, the U. S. Savings Bonds Division functions to promote the sale and retention of savings bonds. Its work is planned and coordinated by the headquarters staff in Washington, D. C., with 12 geographically dispersed market offices giving direction to field activities in 42 state offices.

Overall headquarters administration of the Activity is by a national director who reports directly, and on an almost weekly basis, to the Department of the Treasury's Undersecretary for Monetary Affairs. Under the national director at the headquarters are approximately 94 employees assigned to the following branches and offices: Advertising and Promotion

3/ During the hearing, and after the Activity's presentation of evidence relating to the disputed professional job classifications, the Activity moved that the hearing be closed on the basis that the hearing was limited to questions relative to professional status, and that both the Activity and the AFGE were in agreement as to the handling of this matter pursuant to the challenged ballot procedures. Moreover, the Activity objected to continuing the hearing wherein testimony on the scope of the unit and additional eligibility matters would be adduced - again, because the parties did not disagree as to these issues and because of the limited scope of the hearing. The Hearing Officer denied the Activity's motion.

For reasons enunciated in Army and Air Force Exchange Service, White Sands Missile Range Exchange, White Sands Missile Range, New Mexico, A/SLMR No. 25, the Hearing Officer properly overruled the Activity's motion. The Assistant Secretary is charged with the responsibility for determining the appropriateness of representation units under the Executive Order. Thus, although the parties may have been misled with respect to the scope of the hearing, there is no indication that either party in this case was prejudiced by being required to produce evidence as to the scope of the unit and as to employee eligibility upon which the Assistant Secretary could properly carry out his responsibility under the Order.

4/ The unit appears as amended at the hearing.

Branch; Marketing Branch; Program Planning Office; Public Affairs Office; Administration Office; and Personnel Office.

The national headquarters is responsible for developing programs and policies to fulfill the mission of the Activity. In order to develop and improve policies and programs which are carried out by field office personnel, the headquarters' staff has contact at a national level with all aspects of the bond sales program - for example, advertising media; committees representing payroll savings; schools; labor; and business and banking institutions.

Each headquarters area of specialization is supervised separately with the degree of supervision varying in accordance with employee positions, grades and experience. New employees are considered as trainees and are trained by personnel in the area to which they are assigned. The headquarters' staff works an 8-hour day, and employees are located in separate offices or work areas according to their organizational assignment. Except as noted below, the record reveals they rarely travel outside the headquarters' office.

The U. S. Savings Bonds Division has a centralized personnel office, and employees in all of its offices are covered by the usual Civil Service procedures regulating hiring, job classifications, pay, promotion, discipline, sick and annual leave, and retirement.

The Savings Bonds Division's field offices - i.e., the market and state offices; - comprise approximately 306 employees, and are responsible for the implementation of headquarters' policies and programs at the local level. Each market office is accountable specifically for a set amount of bond sales each year, and employees at the state offices are responsible individually for a required average volume of sales. In order to meet these national policies and programs, in addition to market and state dollar objectives, field personnel must be familiar with all phases of bond sales activity. They perform their duties by establishing initial contacts with local elements of business, labor, schools, and banks with the objective of establishing programs and organizing the volunteers who engage in the actual bond selling. In the performance of their job functions field personnel travel approximately 90 percent of the time and, without overtime compensation, they frequently attend job-related luncheons, dinners, and evening meetings. They are given nationwide consideration for promotion, and, as a condition of their employment, field personnel must be willing to be reassigned to another market area if warranted by the general needs of the Savings Bonds Division.

Field market offices are accountable directly to the Director of Marketing, who also is responsible for training programs in the field. 5/

5/ However, the record reveals that the Director of Marketing delegates his training responsibility to his Sales Staff Development Officer, who periodically conducts training seminars and conferences.

Certain members of the Headquarters' Marketing Branch staff engage in field travel to work with field personnel on general reviews of program activities, or to officiate at special ceremonies requiring higher level representation. Also, in the field is the Distribution Center, located in Chicago, Illinois, which is under the overall direction of the Headquarters' Office of Administration and which serves as a warehouse and distribution point for bond sales materials, and for duplicating and printing material for the regional offices upon their request. 6/

While all headquarters and field employees of the Savings Bonds Division contribute to the accomplishment of the Activity's overall mission, I find that their community of interest, for representation purposes, is essentially limited to this extent. Thus, the record reflects that while the headquarters' personnel are concerned principally with the creation of policies and programs, and report directly to the Undersecretary of the Treasury, the field personnel are engaged in operations work and in fulfilling the programs and policies established by the national headquarters. Although there is some contact between these two employee groups through job training programs, this is an infrequent occurrence, and, moreover, the training acquired is utilized for divergent purposes depending upon whether headquarters or field personnel are involved. Additionally, the record reflects that transfers between the headquarters and the field are minimal and of a permanent, as opposed to a temporary, nature. Therefore, because commonality between these employee groups in terms of job functions, working conditions, locations, immediate supervision, and interchange is limited, I conclude that the headquarters staff of the Savings Bonds Division share a community of interest separate and distinct from the field office employees of the Division, and that, therefore, a unit limited to the headquarters staff would be appropriate. Moreover, in my view, such a unit would promote effective dealings and efficiency of agency operations.

Employee Status and Eligibility Issues

The record reveals that most headquarters and field employees who perform nonclerical and nonadministrative duties for the Savings Bonds Division are given a single Civil Service series classification, GS-011. However, within this series classification, different titles apply according to an individual employee's location within the Division, as well as according to his duties. Overall, the headquarters staff in this series are termed Bond Sales Promotional Specialists, and the field personnel are termed Bond Sales Promotional Representatives, with additional job titles within each of these general job designations.

At the hearing, the parties disagreed as to the professional status of the headquarters Bond Sales Promotional Specialists, GS-011, in the

6/ The record reveals that, over a 3-year period, approximately ten employees have transferred permanently either to or from the headquarters and field offices.

following job classifications: public affairs trainee, industrial payroll savings committee assistant, special projects assistant, and promotion assistant.

Although the evidence establishes that the individuals presently occupying the foregoing positions possess college degrees, it is clear that their degrees are of a general nature and were not a prerequisite for acquiring such positions.7/ To prepare employees for these positions, the Activity relies on extensive on-the-job training, under the direct guidance of supervisors, and on an established apprenticeship program in which each employee takes the following three courses: (1) an American Management Association sales course; (2) a professional sales course; and (3) a general training course in savings bond promotion. The actual duties performed by such employees involve such matters as collecting data on sales techniques, writing reports for instructional and informational purposes, and reviewing reports which aid in the evaluation of campaign progress in different areas of the Bond Sales program. The record reveals that such job functions require adherence to certain well-defined guidelines for the successful completion of the employees' mission.

In Department of Interior, Bureau of Land Management, Riverside District and Land Office, A/SLMR No. 170, I set forth the criteria which would be utilized for ascertaining whether employees are "professionals" within the meaning of the Order. In my opinion, the employees in the above positions do not meet the established criteria. Thus, these classifications do not require knowledge of an advanced type in a field of learning normally acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning; the employees gain their required information and skills through an apprenticeship program of limited duration, or from routine training programs; and they are subject to constant supervision and guidance in the performance of their duties. In these circumstances, I find that the public affairs trainee, industrial payroll savings committee assistant, special projects assistant, and promotion assistant are not professional employees within the meaning of the Order.8/

7/ Notwithstanding that four different classifications are involved, evidence as to their professional status was offered through testimony relating to the job functions of only one. The parties stipulated, however, that this testimony would be applicable to the three remaining classifications.

8/ In this regard, it should be noted also that the Civil Service Commission classifies the GS-011 series as nonprofessional.

The parties stipulated that individuals in certain positions 9/ were management officials because of their responsibility for determining, formulating and overseeing policy as opposed to merely carrying out policy. In support of this stipulation, the parties introduced evidence as to their duties and responsibilities. In Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135, I set forth the criteria which would be utilized for ascertaining whether employees are "management officials" within the meaning of the Order. In my view, the parties' stipulation is sufficient to establish that employees in the categories described above meet the established criteria set forth in Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, cited above. Accordingly, these employees will be excluded from the unit found appropriate.10/

During the hearing, the AFGE amended its claimed unit to exclude the following four secretarial positions as confidential employees: the secretaries to (1) the personnel officer; (2) the special assistant to the national director; (3) the national director; and (4) the deputy national director. The personnel officer advises and counsels the national director and deputy national director on labor relations policies and regulations of the Department of the Treasury and would be involved in any collective bargaining negotiations. The special assistant to the national director also serves in an advisory capacity to these officials on matters relating to labor-management relations. The above four officials are the primary management team, functioning in all aspects of the Activity's labor relations program with each having the authority and responsibility to act in the other's absence.

In support of these officials, their secretaries gather data on personnel actions and research material on labor relations matters, requiring access to office and personnel files not available to other employees in the unit. They also take dictation and type correspondence and memoranda relating to actions taken implementing the Activity's labor-management policies and they compile and keep records on these matters. In my opinion, the foregoing evidence establishes that the four specified secretaries act in a confidential capacity with respect to officials who formulate or effectuate general labor relations policies and that they have regular access to confidential labor relations materials and files.

9/ National director, assistant to the national director, special assistant to the national director, deputy national director, director of marketing, assistant director of marketing, director of advertising and promotion, assistant director of advertising and promotion, director of program planning, director of public affairs, coordinator of banking and volunteer activities, market analysis officer, and administrative officer, GS-13.

10/ The parties also stipulated that employees in the above classifications were supervisors and the stipulation set forth their supervisory authority. On this basis, also, these employees will be excluded from the unit found appropriate.

Under these circumstances, the secretaries to the national director, the deputy national director, the special assistant to the national director, and the personnel officer, will be excluded from the unit found appropriate as confidential employees.11/

The following positions were stipulated by the parties to be supervisory: budget officer; assistant budget officer, liaison officer; chief of office services; printing officer, supervisory voucher examiner, assistant public information officer; assistant market analysis officer, planning and research assistant, accounting supervisor; offset press operator, and administrative assistant, GS-9. 12/ As the record supports the parties' stipulation with respect to the supervisory authority of the above-named classifications, I shall exclude them from the unit found appropriate.

Based on the foregoing, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491: 13/

> All General Schedule and Wage Board employees in the Headquarters Office of the U. S. Savings Bonds Division, Department of the Treasury, located in Washington, D.C., including employees classified as public affairs trainee, industrial payroll savings committee assistant, special projects assistant and promotion assistant; excluding the secretaries to the national director, special assistant to the national director, deputy national director, and personnel officer, employees engaged in Federal personnel in other than a purely clerical capacity, professional employees, management officials, and supervisors and guards as defined in the Executive Order.

11/ See Portland Area Office, Department of Housing and Urban Development, A/SLMR No. 111 and Virginia National Guard Headquarters, 4th Battalion, 111th Artillery, A/SLMR No. 69.

12/ The parties also stipulated that the following positions are supervisory in nature: federal payroll savings executive, broadcasting manager, purchasing agent, assistant to the coordinator of banking and volunteer activities, promotion manager, sales staff development officer, and national labor representative. However, it is clear from both the stipulation and the record that employees in these positions have authority with respect to only one employee. In United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, A/SLMR No. 120, I concluded that employees are not supervisors within the meaning of the Executive Order when the authority they exercise is limited to one employee. Accordingly, I find that the employees in the above classifications are not supervisors within the meaning of the Order and should be included in the unit found appropriate.

13/ As I have found that none of the petitioned for employees are, in fact, professional employees, it follows that a separate, self-determination election for professional employees is not warranted.

DIRECTION OF ELECTION 14/

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 all 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 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 period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by Local 3292, American Federation of Government Employees, AFL-CIO.

Dated, Washington, D.C.
August 7, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

14/ The record in the subject case is unclear as to whether the inclusion in the petitioned for unit of certain employees found to be nonprofessionals, and certain other employees found not to be supervisors, renders inadequate the AFGE's showing of interest. Accordingly, before proceeding to an election, the appropriate Area Administrator is directed to reevaluate the showing of interest. If he determines that, based on the inclusion of certain employees, the AFGE's showing of interest is inadequate, the petition in this case should be dismissed.

August 9, 1972

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

INTERNAL REVENUE SERVICE,
BIRMINGHAM DISTRICT
A/SLMR No. 186

The subject case arose as the result of a representation petition filed by the American Federation of Government Employees, Local 1977, AFL-CIO (AFGE), seeking a unit of all professional and nonprofessional employees of the Internal Revenue Service, Birmingham District, which encompasses all Internal Revenue Service offices in the State of Alabama. The unit sought would include all term, temporary, cooperative student and Intelligence Division employees. The Intervenor, National Association of Internal Revenue Employees, Chapter 12, (NAIRE) is currently the exclusive representative for essentially the same unit as was sought by the AFGE. However, the NAIRE would have excluded certain secretaries as confidential employees. The Activity was in essential agreement with the petitioned for unit, but it contended the Intelligence Division employees were previously excluded from the coverage of the Order pursuant to Section 3(b)(3) of the Executive Order by a determination of the Secretary of the Treasury. It would exclude also two other secretaries as confidential employees.

The Assistant Secretary found that the Intelligence Division employees should be excluded from any unit found appropriate based on an appropriate statement excluding these employees by the Secretary of the Treasury. In this connection, he noted that the Secretary of the Treasury, by letter of July 26, 1971, had declared his belief that employees of the Intelligence Division were covered by Section 3(b)(3) of the Order and that, thereafter, the Federal Labor Relations Council had issued its decision in Naval Electronics Systems Command Activity, Boston, Massachusetts, FLRC No. 71A-12, finding that an agency head's determination with respect to alleged Section 3(b)(3) employees must be honored and is not subject to review by the Assistant Secretary. He noted also that the parties in this case were provided with an opportunity to file briefs concerning the applicability of the Council's decision. In addition, the Assistant Secretary found term, temporary, and cooperative student employees all shared a community of interest with the proposed unit employees and should be included in the unit, and that all secretaries which the Activity and NAIRE sought to exclude were confidential employees and should be excluded from the unit.

The Assistant Secretary found the proposed unit, as modified, to be appropriate and ordered an election in the modified unit.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE,
BIRMINGHAM DISTRICT 1/

Activity

and

Case No. 40-3105 (RO 25)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1977, AFL-CIO

Petitioner

and

NATIONAL ASSOCIATION OF INTERNAL
REVENUE EMPLOYEES, CHAPTER 12

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officers Renee B. Rux and Seymour X. Alsher. The Hearing Officers' 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 all the parties, 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 1977, AFL-CIO, herein called AFGE, seeks an election in a unit of all professional and nonprofessional employees of the Internal Revenue Service, Birmingham District, including all term, temporary, cooperative student, and Intelligence Division employees; excluding employees engaged

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

in Federal personnel and training work in other than a purely clerical capacity, 2/ management officials, and supervisors and guards as defined in the Executive Order. 3/

The Intervenor, National Association of Internal Revenue Employees, Chapter 12, herein called NAIRE, is the exclusive representative for essentially the same unit as is petitioned for in the subject case by the AFGE, which unit encompasses all Internal Revenue Service offices in the State of Alabama. 4/ As originally recognized, the NAIRE's unit apparently covered, 5/ "all eligible non-supervisory /sic/ employees in the Birmingham District," with the following exceptions: "1. Management Officials (Assistant Division Chiefs and above); 2. Supervisors; 3. Employees engaged in Personnel or Training work in other than a purely clerical capacity; 4. Investigative personnel in the Intelligence Division (Special Agents); 5. Employees serving under temporary, limited, or excepted appointment; /and/ 6. Program Analyst (Staff Assistant)."6/ It appears that in 1970, the Activity and the NAIRE attempted to alter coverage of the unit by an amendment to their 1968 agreement. Thus, the parties' current agreement states as to unit exclusions, that: (a) in part one above, "delete 'Assistant Division Chiefs and above';" (b) in part four, "change 'Investigative personnel' to''employees';" (c) in part five, "revise to read 'employees serving under temporary or limited appointments and under cooperative education agreements';" and (d) add a part seven reading "Secretaries in the Office of the District Director, Division Chiefs, and Personnel Officer."

With respect to the instant petition, the NAIRE, at the outset, took the position that a representation hearing is not the proper forum in which to consider the eligibility of Internal Revenue Service Intelligence Division employees for Federal sector collective bargaining units within the meaning of Section 3(b)(3) of the Executive Order. 7/ Furthermore, it contended that the Internal Revenue Service's determination to exclude these employees by its own agency regulation interpreting Section 3(b)(3) is "an arbitrary and capricious action on the part of management," and that these employees do not exercise the function specified in this Section. The NAIRE agrees with the AFGE's inclusion of term, temporary, and cooperative student employees in the claimed unit. It would, however, exclude the following secretaries as confidential employees: (1) District Director Secretary; (2) Assistant District Director Secretary; (3) Administration Division Secretary; and (4) Personnel Branch Secretary. 8/

2/ No evidence was offered pertaining to employees engaged in training work as a basis for exclusion, or inclusion, in the requested unit by any party to this proceeding. Therefore, I make no finding as to this job category.

3/ The unit appears as amended at the hearing. Although not stated during the hearing, the AFGE, in its brief to the Assistant Secretary, noted that it would agree to a unit excluding all Intelligence Division employees.

4/ The parties agree that the unit scope is not an issue herein and I have, in fact, found state-wide Internal Revenue Service units appropriate in previous cases. See, e.g., Internal Revenue Service, Indianapolis District, A/SLMR No. 52 and Internal Revenue Service, New Orleans District, A/SLMR No. 16.

5/ This unit description is quoted from a collective bargaining agreement between the Activity and the NAIRE, effective for two years from its approval date of September 3, 1968.

6/ Because no mention is made in the petition or overall record about a Program Analyst position, as with employees engaged in training work (see footnote 2 above), I make no finding on this job category.

7/ Section 3(b)(3) of the Executive Order provides that the Order is not applicable to "any other agency, or office, bureau, or entity within an agency, which has as a primary function intelligence, investigative, or security work, when the head of the agency determines, in his sole judgment, that the Order cannot be applied in a manner consistent with national security requirements and considerations."

8/ Prior to the hearing, the NAIRE filed a Motion to Dismiss the Petition with the Area Administrator citing three bases. One aspect of the Motion challenging the adequacy of the AFGE's showing of interest was dismissed by the Area Administrator under Section 202.2(f) of the Assistant Secretary's Regulations. It should be noted in this regard that Section 202.2(f) provides, in pertinent part, that an Area Administrator's determination as to adequacy of showing of interest "shall not be subject to collateral attack at a unit or representation hearing." The Area Administrator, however, did not rule on the two remaining aspects of the motion.

As to the first, alleging that the petition herein was not timely filed, I conclude that since the NAIRE's agreement with the Activity had a terminal date of August 30, 1971, and the petition was received by the appropriate Area Administrator on June 25, 1971, it was timely, and there is no agreement bar to the instant petition. See Report on a Decision of the Assistant Secretary, Report No. 38.

(Continued)

The Activity is in essential agreement with the AFGE's petitioned for unit. However, it argues that Internal Revenue Service Intelligence Division employees already have been classified as excludable from Federal sector representation units under Section 3(b)(3) of the Order by a determination of the Secretary of the Treasury, previously conveyed in a letter to the Assistant Secretary of Labor for Labor-Management Relations, which is contained in the record in this case, that their primary job function relates to national security requirements and considerations. Finally, in accord with the NAIRE, the Activity would exclude as confidential employees those employees occupying the four positions described above by the NAIRE, along with two others - Audit Division Secretary, and Collection and Taxpayer Services Division Secretary - totaling six alleged confidential secretaries.

Discussion and Findings

The Activity is headquartered in Birmingham, Alabama, and has a number of local offices scattered throughout the State. General responsibility for the administration of the entire operation rests with the Birmingham district director and his assistant. There are four functional divisions carrying out the Activity's Federal income tax collection mission: Administration; Audit; Collection and Taxpayer Service; and Intelligence Division. Each division is headed by a division chief. Personnel matters are handled by the Personnel Branch, a subdivision of the Administration Division, under the direction of a branch chief. In all, the Activity employs approximately 378 employees, of whom some 181 are classified as professionals; 9/ 98 as nonprofessionals; and 21 special agents and 6 clericals in the Intelligence Division.

Intelligence Division Employees.

Prior to the hearing in this case, the eligibility of Intelligence Division employees in the Department of the Treasury's Internal Revenue Service districts throughout the United States was an issue in several representation matters arising under the Executive Order. In connection with one case, the Secretary of the Treasury, by letter to me dated July 26, 1971, 10/ declared his belief that these employees were covered by Section 3(b)(3) of the Order. Because the efficacy and reviewability of this kind of agency head determination were still matters which had not been considered finally by the Federal Labor Relations Council (Council) at the time of the instant hearing, all possible additional evidence and arguments, as well as the conclusion on the eligibility of the Activity's Intelligence Division employees with respect to the requested unit, were left open for my consideration. However, on January 19, 1972, the Council issued its decision in Naval Electronic Systems Command Activity, Boston, Mass., FLRC No. 71A-12, finding that an agency head's clear and explicit statement that he has assured himself of the facts pertaining to the employees excluded under Section 3(b)(3) and has personally determined that the particular employee group should be excluded, meets the Order's requirements and must be honored. Moreover, the Council concluded such a statement is not subject to review by the Assistant Secretary.

As the hearing in this case took place prior to the issuance of the above-noted Council decision and, therefore, the parties could not state their respective positions concerning the applicability of the Council's decision to the Secretary of the Treasury's letter of July 26, 1971, they were notified on May 4, 1972, that they could file briefs on this question. Thereafter, the NAIRE withdrew its objection to the exclusion of the Intelligence Division employees from the petitioned for unit, and the Activity filed a brief supporting the Secretary of the Treasury's July 26th statement, its original position.

8/ I conclude also that the NAIRE's remaining allegation, that the petition herein should not be considered because it fails to request a unit "coextensive with the present collective bargaining /sic/ unit," is without merit. Notwithstanding that the prior collective bargaining history, and the specific unit connected therewith, are factors to be considered in determining unit appropriateness, these are not, by any means, sole and conclusive factors. On the one hand, the record in this case includes these elements which I have taken into consideration in resolving this matter. See, United States Department of the Navy, United States Naval Weapons Station, Yorktown, Virginia, A/SLMR No. 30, at footnote 1. On the other hand, I note too that the NAIRE, in expressing its position with respect to the requested unit, adopts a position as to unit appropriateness, in terms of employee eligibility, which differs from the employees described in its two previous collective bargaining agreements.

9/ At the hearing, all parties stipulated, and I find the record establishes, that employees occupying the job classifications of Attorney (Estate and Gift Tax), Tax Auditor, Internal Revenue Agent, and Revenue Officer are professional employees within the meaning of the Executive Order. Cf. Department of the Interior, Bureau of Land Management, Riverside District and Land Office, A/SLMR No. 170. Such employees, therefore, may not be included in a unit with nonprofessionals unless a majority votes for inclusion in the unit.

10/ As noted above, the Secretary of the Treasury's letter was accepted as an exhibit in this proceeding.

In light of all the foregoing, I conclude that the Secretary of the Treasury has submitted an appropriate statement excluding the employees in question under Section 3(b)(3) of the Order. Accordingly, I find that Internal Revenue Service Intelligence Division employees should be excluded from any unit found appropriate.

Term employees. The Activity has nine term employees, all GS-3 or GS-4 clerks. The record reveals that they are former permanent employees who have been reemployed, by permission of the Civil Service Commission, for appointments ranging from 14 to 22 months. This was done to avoid involuntarily separating them from the Activity when their jobs were eliminated due to the conversion of certain portions of its operations to automatic data processing. However, with the exception of tenure, there is no evidence that any other working conditions of the affected employees have been altered as a result of this change to term appointments.

Because this employee group is still, essentially, comparable to permanent employees on the basis of almost all working conditions, I find that the term employees in this case have a clear and identifiable community of interest with employees in the unit sought and are, therefore, eligible for inclusion in the appropriate unit. 11/

Temporary employees. There are four temporary employees at the Activity. They are either GS-2 or GS-3 clerks, and hold appointments for more than ninety days in one case, for one year. All four perform the same duties, during the usual workweek, as other Activity employees in like job classifications. Working conditions, too, are identical. No party herein disputes that these employees have a reasonable expectancy of continuing employment on a regular basis for a sizable period of time.

Under the circumstances, I find that, despite the designation of "temporary," these employees have a reasonable expectation of continuing employment and they possess the requisite community of interest for inclusion in an appropriate unit. 12/

Cooperative student employees. Since December 1966, the Activity has engaged in a program to recruit well-trained people for permanent jobs by contracting with colleges and universities so that, starting with second-year students, an individual may alternate school quarters or semesters with regular work at the Activity. Upon completion of the student's course work, it is anticipated he will become a regular, permanent Activity employee.

11/ Cf. Defense Supply Agency, Defense Depot, Memphis, Tennessee, A/SLMR No. 107.

12/ Cf. United States Army Training Center and Fort Leonard Wood at Fort Leonard Wood, Missouri, A/SLMR No. 27; Portland Area Office, Department of Housing and Urban Development, A/SLMR No. 111.

Up to the present, a total of 15 students have participated in the program. Three have moved into regular positions; five have resigned; and of the remaining seven cooperative student employees, three are currently working at the Activity and four are attending school. Over a 12-month period, each student employee works from three to six months. When working, he is classified as a Student Trainee (Accounting), with a starting grade of GS-3 and the possibility of advancement to GS-5. In this capacity, he performs duties similar to an Internal Revenue Agent Trainee, and both work under the same supervision. Student employees retain, at all times, most of the same Civil Service benefits; such as leave, life and health insurance; but when in school, they are in a nonpay status.

Given that the purpose of the cooperative student employee position is permanent employment with the Activity, and because this goal is attained under comparable working conditions to those of regular employees situated in a similar capacity, I find that cooperative students share a community of interest with proposed unit employees and, thus, should be included in that unit.

Confidential employees. As indicated above, the AFGE did not exclude any employees from its claimed unit as confidential; the NAIRE states there are four; and the Activity points to six such positions. I agree that the record sustains a finding that employees in six secretarial positions are confidential employees. Included in this group are the following:

(1) District Director Secretary - This is the District Director's private secretary. She attends and takes minutes of meetings between Activity management officials and union representatives, and also, private meetings of management officials dealing with the Activity's labor relations matters. She receives confidential material concerning employees, for example, adverse action and grievance papers. Private files on labor-management relations are maintained by this secretary, who types much of the material contained in the files.

(2) Assistant District Director Secretary - Located in the same office with the District Director's secretary, the Assistant Director's secretary performs all of the above-discussed functions of the Director's secretary when she is absent. This means that the Assistant's secretary must be familiar, constantly, with the duties and substance of that position, as well as personally handling such duties for as much as six weeks a year. She also helps maintain the private files kept in the office as part of her regular duties. The taking of minutes at negotiating sessions for collective bargaining agreements, and the typing of Activity proposals and counter-proposals for such agreements are included in her duties.

(3) Administration Division Secretary - The Administration Division is composed of three branches, one of which is the Personnel Branch, and it performs overall staff functions for the Office of the District Director. In his capacity as head of the Administration Division, the Chief is involved intimately in all of the Birmingham District office's personnel and

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labor-management relations matters. His secretary assists him in much the same way as the District Director's secretary works with the District Director. Thus, she attends and takes minutes of division-level meetings where personnel and labor relations subjects are discussed. Maintenance of files relating to these subjects is another of her duties, along with the typing of memoranda and correspondence of the same sort. All material on labor-management relations sent to the District Director is first deposited in the Administration Division office for proper channeling, most often first to the Personnel Branch and then to the Director's office. During negotiation of the 1968 collective bargaining agreement with the NAIRE, the Administration Division Chief was the Activity's spokesman on its negotiating team, and his secretary worked closely with him throughout by typing proposals and keeping a file on the course of bargaining.

(4) Personnel Branch Secretary - The Personnel Branch Chief has direct responsibility for carrying out district office personnel programs. Practically all correspondence addressed to the district director on employee matters is referred to the Personnel Branch office for review and action. Advisory opinions for management officials on adverse actions and grievances are prepared in this office. Its Chief was also a member of the Activity's negotiating team dealing with the Intervenor in 1968, and again in 1970. The Personnel Branch secretary is active in all of these areas by way of taking dictation, preparing, typing, and filing material relative thereto. She also does research for the Branch Chief in terms of what management may have done in the past regarding a specific personnel matter.

(5) Audit Division Secretary - While the Audit Division is an operating section of the Activity, concerned with examining Federal tax returns for correctness, its Chief is charged with general responsibility for how the division and its employees function in a labor-management relations sense. Moreover, he, in fact, actively participated in the 1968 activity-wide collective bargaining with the NAIRE as a negotiation team member. Personally assisting the Audit Division Chief is his secretary, who takes notes at weekly staff meetings dealing with division personnel problems. All typing and filing of relevant material is performed by this secretary, whether flowing from such meetings or collective bargaining in general.

(6) Collection and Taxpayer Service Division Secretary - As with the Audit Division, this division is also an operating section of the Activity. Its name reflects the two major functions performed - collection of delinquent tax returns and accounts and provision of taxpayer assistance. The Division Chief oversees these functions and additionally directs the personnel aspects of the division. He, too, was a participant in the 1968 negotiations as an Activity team member. The secretary in this division is analogous to the Audit Division Secretary in the scope of her job duties. Again, there is the taking of notes at weekly staff meetings and the typing and filing of both division personnel and broad labor-management relations material.

In prior decisions, 13/ I have found that when an employee acts and assists persons who formulate and effectuate management policies in the field of labor relations, such an employee is a confidential employee who should be excluded from appropriate bargaining units. I find that the job requirements for the above six positions qualify them as confidential employees in this sense. Thus, the record reflects that these secretaries work directly with management officials charged with a number of significant labor-management relations responsibilities. Moreover, their work includes more than mere access to personnel information. In these circumstances, I find that employees occupying the six-named secretarial positions should not be included in the unit found appropriate in this case.

Conclusion

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

> All professional and nonprofessional employees of the Internal Revenue Service, Birmingham District, including all term, temporary, and cooperative student employees; excluding all employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, the secretary to the District Director, the secretary to the Assistant District Director, the secretary to the Chief of the Administration Division, the secretary to the Chief of the Personnel Branch, the secretary to the Chief of the Audit Division, the secretary to the Chief of the Collection and Taxpayer Service Division, Intelligence Division employees, and supervisors and guards as defined in the Executive Order.

As stated above, the unit found appropriate includes professional employees. The Assistant Secretary, however, is prohibited by Section 10(b)(4) of the Order from combining, in a single unit, professional employees with employees who are not professionals, unless a majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of professional employees as to inclusion in a unit with nonprofessional employees must be ascertained. I, therefore, shall direct separate elections in the following voting groups:

13/ See Virginia National Guard Headquarters, 4th Battalion, 111th Artillery, A/SLMR No. 69; and Portland Area Office, Department of Housing and Urban Development, cited above.

Voting group (a): All professional employees of the Internal Revenue Service, Birmingham District, including all term, temporary, and cooperative student employees; excluding all nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, the secretary to the District Director, the secretary to the Assistant District Director, the secretary to the Chief of the Administration Division, the secretary to the Chief of the Personnel Branch, the secretary to the Chief of the Audit Division, the secretary to the Chief of the Collection and Taxpayer Service Division, Intelligence Division employees, and supervisors and guards as defined in the Executive Order.

Voting group (b): All nonprofessional employees of the Internal Revenue Service, Birmingham District, including all term, temporary, and cooperative student employees; excluding all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, the secretary to the District Director, the secretary to the Assistant District Director, the secretary to the Chief of the Administration Division, the secretary to the Chief of the Audit Division, the secretary to the Chief of the Collection and Taxpayer Service Division, Intelligence Division employees, and supervisors and guards as defined in the Executive Order.

Employees in the nonprofessional voting group (b) will be polled whether they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, Local 1977, AFL-CIO; the National Association of Internal Revenue Employees, Chapter 12, or by neither labor organization.

Employees in the professionalvoting group (a) will be asked two questions on their ballots: (1) whether they desire to be included with nonprofessional employees for the purpose of exclusive recognition, and (2) whether they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, Local 1977, AFL-CIO; the National Association of Internal Revenue Employees, Chapter 12, or by neither labor organization. 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).

In the event that a majority of the valid votes of voting group (a) are not cast for inclusion in the same unit as nonprofessional employees, they will be considered 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 American Federation of Government Employees, Local1977, AFL-CIO; the National Association of Internal Revenue Employees, Chapter 12, or neither 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 shall now make the following findings with regard to the appropriate unit:

1. If a majority of professional employees votes for inclusion in the same unit as nonprofessional employees, I find that the following group of employees constitutes a single 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, Birmingham District, including all term, temporary, and cooperative student employees; excluding all employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, the secretary to the District Director, the secretary to the Assistant District Director, the secretary to the Chief of the Administration Division, the secretary to the Chief of the Personnel Branch, the secretary to the Chief of the Audit Division, the secretary to the Chief of the Collection and Taxpayer Service Division, Intelligence Division employees, and supervisors and guards as defined in the Executive Order.

2. If a majority of professional employees does not vote for inclusion in the same unit as 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 professionalemployees of the Internal Revenue Service, Birmingham District, including all term, temporary, and cooperative student employees; excluding all nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, the secretary to the District Director, the secretary to the Assistant District Director, the secretary to the Chief of the Administration Division, the secretary to the Chief of the Personnel Branch, the secretary to the Chief of the Audit Division, the secretary to the Chief of the Collection and Taxpayer Service Division, Intelligence Division employees, and supervisors and guards as defined in the Executive Order.

(b) All nonprofessional employees of the Internal Revenue Service, Birmingham District, including all term, temporary, and cooperative student employees; excluding all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, the secretary to the District Director, the secretary to the Assistant District Director, the secretary to the Chief of the Administration Division, the secretary to the Chief of the Personnel Branch, the secretary to the Chief of the Audit Division, the secretary to the Chief of the Collection and Taxpayer Service Division, Intelligence Division employees, and supervisors and guards as defined in the Executive 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 furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period, and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, Local 1977, AFL-CIO, the National Association of Internal Revenue Employees, Chapter 12, or by neither labor organization.

Dated, Washington, D. C.
August 9, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

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

U. S. DEPARTMENT OF THE ARMY,
RED RIVER ARMY DEPOT,
LONE STAR ARMY AMMUNITION PLANT,
TEXARKANA, TEXAS
A/SLMR No. 187

The Petitioner, Local 750, International Chemical Workers Union, AFL-CIO, sought to represent a unit of all Quality Inspection Specialists (Inspectors). The Activity asserted that the appropriate unit should encompass all of its employees including clericals and employees classified as "technicals".

The Assistant Secretary found that the unit petitioned for was inappropriate. In this regard, he noted that all of the Activity's employees are classified as General Schedule employees; are in the same competitive Activity-wide area; operate under the same promotion plan; are paid by the same payroll office; and are governed by the same administrative regulations. Further, he noted that there is a substantial functional interrelationship between employees in many of the Activity's job classifications.

The Assistant Secretary found, however, that the unit as contended for by the Activity was appropriate and that such a comprehensive unit would promote effective dealings and efficiency of agency operations.

Inasmuch as the unit found appropriate differed substantially from that sought in the original petition, the Assistant Secretary noted that the ICWU would be premitted to withdraw its petition if it did not desire to proceed to an election in the unit found appropriate. Further, if the ICWU desired to proceed to an election, the Assistant Secretary directed that the Activity post copies of a Notice of Unit Determination so that labor organizations might intervene in this proceeding for the sole purpose of appearing on the ballot.

A/SLMR No. 187

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. DEPARTMENT OF THE ARMY,
RED RIVER ARMY DEPOT,
LONE STAR ARMY AMMUNITION PLANT.
TEXARKANA, TEXAS 1/

Activity

and

Case No. 63-3369(RO)

LOCAL 750, INTERNATIONAL CHEMICAL
WORKERS UNION, 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 Robert J. Hurtado. 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. Local 750, International Chemical Workers Union, AFL-CIO, herein called the ICWU, seeks an election in a unit of all Quality Inspection Specialists of the Activity, commonly and herein referred to as Inspectors, excluding management officials, clerks, professional employees, and guards, and supervisors as defined in Executive Order 11491. 2/

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

2/ It appears from the record that the omission from the claimed unit of the mandatory exclusion "employees engaged in Federal personnel work in other than a purely clerical capacity" was inadvertent.

At the outset of the hearing, the parties stipulated that the following employees should be excluded from the claimed unit: (1) the secretary to the Commanding Officer (who heads the Activity), and the secretary to the Executive Officer, on the basis that they are confidential employees; (2) one engineer and two accountants on the basis that they are professional employees within the meaning of the Order; (3) the Security Officer (who is the head of the Security Office and is responsible for the entire security program of the Activity) on the basis that he is a management official within the meaning of the Order; and (4) nineteen supervisory employees. 3/ As there is no evidence to indicate that the parties' stipulation was improper, I find that the employee classifications enumerated in the stipulation should be excluded from any unit found to be appropriate.

The Activity asserts that the petitioned for unit is inappropriate and would not contribute to the efficiency of operations and effective agency dealings, and that the only appropriate unit should include all employees of the Activity with the exception of the stipulated exclusions and the mandatory exclusions under the Order. Thus, in addition to the Inspectors petitioned for by the ICWU, the Activity would include fourteen clericals and sixteen other employees who the Activity refers to as "technicals". 4/

The Activity is a shell-loading, Government-owned, contractor-operated industrial installation located at the Red River Army Depot. Its primary mission is to monitor the contractor's operation with regard to the latter's production of ammunition. The Activity consists of three divisions -- the Quality Assurance Division, the Contract Administration Division, and the Operations Review Division; two offices -- the Administrative Office and the Safety Office; and a Special Staff. It employs approximately 122 employees.

3/ Among the classifications which the parties would include as supervisory were the Civilian Operations Officer; Traffic Manager; Chief Administrative Officer; Chief Safety Manager; Chief Supervisory Industrial Specialist; Chief Supervisory Contract Administrator; Supervisory Accountant; Industrial Property Management Specialist; and Supervisory Quality Assurance Specialist (AMMO).

4/ Those in the technical category are classified as Safety Specialist; Accountant Technician; Property Management Specialist; Transportation Specialist; Equipment Specialist; Industrial Specialist; Quality Assurance Specialist (Metrology), and Quality Assurance Specialist (AMMO).

The approximately 67 Inspectors, who are employed in the Quality Assurance Division, work on the "lines" in the production areas located throughout the Activity. Their duties involve the inspection of the products manufactured by the contractor. Although it appears that the above-mentioned sixteen "technicals" who the Activity would include in the claimed unit work primarily at headquarters on the day shift, 5/ the record indicates that Safety Specialists make inspections of the "lines"; Industrial Specialists make inspections of the equipment and machinery that are used on the "lines"; and other Industrial Specialists oversee and monitor the projects for the production of the ammunition that is going on the line. The record further reveals that a recurring duty of many of the "technical" employees is to visit practically all of the production lines and all of the work areas from time to time to accomplish their particular job functions. The evidence also establishes that the fourteen clericals who the Activity would include in the claimed unit work throughout the installation in supportive activities related to the Inspectors' job functions as well as those of other Activity employees.

The evidence establishes that all employees of the Activity are classified as General Schedule; compete for grades on an Activity-wide basis; operate under the same promotion plan; are paid out of the same payroll office; and are governed by the same administrative regulations. Furthermore, the record indicates that three former Inspectors are now working in the classifications of Safety Specialist and Equipment Specialist and that the Quality Assurance Specialists, employed in the same Division as the Inspectors, are engaged primarily in the formulation of the inspection procedures which are used by the Inspectors on the "lines."

Based on the foregoing, I find that the unit sought by the ICWU, limited to the Activity's Inspectors, is inappropriate. Thus, as noted above, all classifications of employees within the Activity are covered by the same personnel practices and policies; promotional opportunities are made available on an Activity-wide basis; and there is a substantial functional interrelationship between employees in many of the job classifications of the Activity. In these circumstances, and noting also the Activity's contention that a unit limited to Inspectors would not promote effective dealings and efficiency of its operations, I find that the unit sought by the ICWU is not appropriate.

I further find that an Activity-wide unit of nonsupervisory and nonprofessional employees, in which I am advised administratively that the ICWU's showing of interest is in excess of thirty percent, is appropriate for the purpose of exclusive recognition. Thus, the evidence

5/ Inspectors work on either a day shift or on a "swing shift." The "swing shift"is one which concides with the work sthedule of the contractor and occurs other than during the hours of the day shift.

establishes that all employees are subject to common working conditions with opportunities for promotions and transfers on an Activity-wide basis, and are engaged in an integrated operation at the same location. In these circumstances, I find that there is a clear and identifiable community of interest among such employees and, moreover, that such a comprehensive unit will promote effective dealings and efficiency of agency operations.

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

> All employees employed by the U. S. Department of the Army at the Lone Star Army Ammunition Plant, Red River Army Depot, Texarkana, Texas, excluding the secretary to the Commanding Officer, the secretary to the Executive Officer, all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

DIRECTION OF ELECTION

In the circumstances set forth below, an election by secret ballot shall be conducted among the employees in the unit found appropriate not later than 60 days from the date upon which the appropriate Area Administrator issues his determination with respect to any interventions in this matter. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by Local 750, International Chemical Workers Union, AFL-CIO, or by any other labor organization which, as discussed below, intervenes in this proceeding on a timely basis.

Because the above Direction of Election is in a unit substantially different than that sought by the ICWU, I shall permit it to withdraw its petition if it does not desire to proceed to an election in the unit found appropriate in the subject case upon notice to the appropriate Area Administrator within 10 days of the issuance of this Decision. If the ICWU desires to proceed to an election, because the unit found appropriate is substantially different than that it originally petitioned for, I direct that the Activity, as soon as possible, shall post copies of a Notice of Unit Determination, which shall be furnished by the appropriate Area Administrator, in places where notices are normally posted affecting the employees in the unit I have herein found appropriate. Such Notice shall conform in all respects to the requirements of Section 202.4(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 election among the employees in the unit found appropriate.

Dated, Washington, D. C.
August 24, 1972

W. J. Usery, Jr., Assistant Secretary of
Labor for Labor-Management Relations

August 24, 1972

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

UNITED STATES ARMY INFANTRY CENTER,
NON-APPROPRIATED FUND ACTIVITY,
FORT BENNING, GEORGIA
A/SLMR No. 188

The Petitioner, Service Employees International Union, Local 579, AFL-CIO, (SEIU) sought to represent a unit of all nonsupervisory full-time and part-time "Category B" employees of the Non-Appropriated Fund Activity, Fort Benning, Georgia (NAF), including intermittent employees who work more than 500 hours annually. The Intervenor, the Federal Employees Metal Trades Council, AFL-CIO, (MTC) was in substantial agreement with the unit petitioned for by the SEIU. The Activity contended that the claimed unit was inappropriate and that the only appropriate unit should consist of all nonsupervisory "Category A" and "Category B" employees, excluding all "intermittent" employees.

The Assistant Secretary found that a unit limited to "Category B" employees of the NAF was not appropriate in that such employees do not share a clear and identifiable community of interest separate and distinct from those classified as "Category A" employees. In this connection, the Assistant Secretary noted that "Category B" employees, who perform primarily manual labor in such positions as waiters, waitresses, bartenders, cooks, maids, janitors, and maintenance employees, and employees in "Category A," who perform primarily administrative or clerical work in such positions as cashiers, inventory clerks, supply clerks handling all resaleable items of food, procurement personnel, recreation aides, and package store sales clerks, in many instances work in the same areas; perform similar duties; may be supervised by the same supervisor; use the same parking and eating facilities; perform certain duties for one another when the need arises; are subject to the same personnel policies and procedures; are subject to the same promotion and reduction-in-force plans; and may be promoted or assigned across organizational lines. At the hearing, both the SEIU and the MTC indicated a desire to participate in an election in any unit found appropriate by the Assistant Secretary.

Under these circumstances, he found that although a unit limited to "Category B" employees would not be appropriate, a unit consisting of all the NAF employees in both "Category A" and "Category B" was appropriate for the purpose of exclusive recognition and would promote effective dealings and efficiency of agency operations.

With respect to the eligibility of "intermittent" employees, the Assistant Secretary determined that their inclusion in the unit was warranted. Thus, he noted that the employees in this classification have a reasonable expectancy of continued employment; that a majority of them work a substantial period of time during the year; 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.

Although the SEIU and MTC indicated their desire to participate in an election in any unit found appropriate, the Assistant Secretary dismissed the petition because he was advised administratively that the SEIU's showing of interest was inadequate in the unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES ARMY INFANTRY CENTER,
NON-APPROPRIATED FUND ACTIVITY,
FORT BENNING, GEORGIA 1/

Activity

and

Case No. 40-3573 (RO-25)

SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 579, AFL-CIO

Petitioner

and

FEDERAL EMPLOYEES METAL TRADES
COUNCIL, AFL-CIO

Intervenor

DECISION AND ORDER

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

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

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 Petitioner, Service Employees International Union, Local 579, AFL-CIO, herein called SEIU, seeks an election in a unit of all full-time and part-time employees of the Non-Appropriated Fund Activity, Fort Benning, Georgia (NAF), including off-duty military employees, in "Category B" positions 2/, excluding all employees, including off-duty military employees, in "Category A" positions 3/, 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. The SEIU would include in its claimed unit all "Category B" intermittent employees who work over 500 hours annually. The Intervenor, Federal Employees Metal Trades Council, AFL-CIO, herein called MTC, is in substantial agreement with the unit petitioned for by the SEIU.

The Activity contends that the petitioned for unit is inappropriate. In this regard, it maintains that the only appropriate unit should include both "Category A" and "Category B" employees serviced by the Fort Benning Civilian Personnel Office, excluding, in addition to the mandatory exclusions under the Executive Order, all "intermittent" employees and all off-duty military employees. The Activity asserts that the petitioned for unit is inappropriate and that such a unit would not promote effective dealings and efficiency of the agency operations.

The record indicates that Fort Benning, herein called the Post, is the home of the United States Army Infantry Center and School, and that its primary mission is to train infantry soldiers. The NAF is composed of activities which provide facilities contributing to the morale, welfare and recreation of the military personnel of the United States Army. The Post consists of 5 main Areas: The Main Post; Kelley Hill and Martin Army Hospital; Harmony Church; Sand Hill; and Custer Road Terrace. For the most part, the NAF activities are located throughout these areas, 4/ and consist of the Central Service Office, Central Post Fund, Flying Club, Educational Development, Rod and Gun Club, Special Services, Non-commissioned Officers Clubs (NCO), Fort Benning Officers Open Mess (FBOOM), Guest House, Bachelors Officers Quarters (BOQ), and the Book Department. 5/ Within these NAF activities are nineteen income producing operations. 6/

Each NAF activity is headed by a Custodian who is responsible for the operation of the program under his jurisdiction. Below the Custodians are first and second line supervisors. The record reveals that the supervisory chain above the Custodian level consists of the Commanding General's representative, and then the Commanding General.

The personnel policies and procedures of the NAF and related activities are established by regulations and directives of the United States Army. The Civilian Personnel Office, which handles all personnel matters for all of the NAF at the Post, has the authority and responsibility for implementing these policies and procedures and has responsibility for final action with regard to hiring, firing, and promotions. The employees of the various NAF activities who, in all categories and classifications, number approximately 779, are employed under uniform pay scales; are subject to the same merit promotion plan; may be promoted or reassigned across organizational lines; are retained on the same retention registers for the purpose of reduction in force; are paid through a central accounting office; and are governed by the same regulations.

The record reveals that the "Category B" employees of the NAF in the claimed unit fill positions such as waiters, waitresses, bartenders, cooks, maids, janitors, golf course green attendants, warehousemen, carpenters, electricians, and maintenance employees. On the other hand,

2/ "Category B" positions are defined as: "All positions occupied by employees... which have as a major duty work either in a recognized trade or craft or requiring the performance of manual labor.... Such positions include but are not limited to waiters, waitresses, bartenders, janitors, etc."

3/ "Category A" positions are identified as: "All positions occupied by employees... which have as a major duty the supervision or performance of professional, administrative, fiscal or clerical work (including stenography and typing)...."

4/ The NAF includes also a recreation area facility located approximately 220 miles from the Post at Destin, Florida. This area is for the recreation of military personnel and their dependents, and contains, among other things, 15 cabins, deep sea fishing boats, ski boats, and snack bars. Except for the manager, all the employees at this location are "intermittent" employees in "Category B." Although the petition was not formally amended in this regard, the SEIU and the MTC agreed that these employees should be included in the unit.

5/ Although the Civilian Personnel Office at the Post is not an NAF activity, it employs nine NAF employees.

6/ Such activities include, but are not limited to, golf courses, a country club, swimming pools, tennis courts, snack bars, dog kennels, and package stores.

"Category A" employees of the NAF include personnel classified as cashiers, inventory clerks, supply clerks handling all resaleable items of food, procurement personnel, package store sales clerks, recreation aides, the golf course "pro" and his assistant, a personnel staffing specialist and her assistant, file clerks, clerk-typists, stenographers, and all supervisors.

The record shows that in many instances "Category A" employees work in the same areas as "Category B" employees. 7/ Furthermore, the record indicates that both "Category A" and "Category B" employees may perform similar duties within a particular NAF activity. Thus, bartenders not only dispense liquor but are required to accept payment and "ring up" sales made on the cash registers; cashiers are called upon to help in "bussing" tables in the coffee shop when the need arises; cashiers in the snack bar of the bowling center are required when necessary (which appears to be almost daily) to assist the cook in preparing the food; and the mechanic in the bowling alley assumes the duties of the recreation aide when necessary. Further, the various "Category A" accountability, inventory, and purchasing clerks work in close contact with, among others, the "Category B" chefs and bartenders, and both "Category A" and "Category B" employees use the same parking facilities and eat in the same areas. Moreover, in several of the activities, the evidence establishes that in some instances the same supervisor supervises both "Category A" and "Category B" employees.

Based on the foregoing, I find that a unit limited to "Category B" employees of the NAF would not be appropriate for the purpose of exclusive recognition. Thus, the record reflects that while "Category B" employees are engaged primarily in manual labor and "Category A" employees perform primarily administrative or clerical work, the evidence establishes that employees in the separate Categories do not share a clear and identifiable community of interest. In this connection, the record reveals that all employees of the NAF are subject to the same personnel policies and procedures; are subject to the same promotion and reduction-in-force plans; are governed by the same regulations; and may be promoted or assigned across organizational lines. Moreover, the record reflects that employees in "Category A" and in "Category B" are often engaged in highly integrated operations involving close daily contact under common supervision, and that they

7/ These include, but are not limited to, coffee shops, snack bars, cocktail lounges and bowling alleys.

frequently perform similar duties within a particular NAF activity.

At the hearing, both the SEIU and the MTC indicated a desire to participate in an election in any unit found appropriate by the Assistant Secretary. Under these circumstances I find that while a unit limited to either "Category A" or "Category B" employees would not be appropriate for the purpose of exclusive recognition, a unit consisting of all the NAF employees in both "Category A" and "Category B" would be appropriate for the purpose of exclusive recognition and would promote effective dealings and efficiency of agency operations.

Intermittent Employees

The record reveals that the NAF employs approximately 300 employees who it classifies as "intermittents. 8/ These employees, both civilian and off-duty military, are considered by the Activity to be on a "call basis." They are primarily "Category B" employees performing similar duties to those performed by regular and part-time employees in such jobs as waiters, food and cocktail waitresses, and bartenders. 9/ The record reveals that these employees share the same working conditions, mission and supervision as regular full-time and part-time employees, although they may not be the beneficiaries of the regular fringe benefits of employment.

The SEIU and the MTC request the inclusion of these employees in the claimed unit if they are employed for more than 500 hours in any one year. The Activity asserts that "intermittent" employees

8/ The Department of the Army Regulations define intermittent employment with respect to NAF civilian employees as those working less than full-time and for whom a regular tour of duty during the administrative workweek has not been prescribed in advance.

9/ The record indicates that there is no particular limitation on the number of hours intermittent employees may work in a year and that a number have worked over 1500 hours in the past year. The record indicates further that if the work of these employees amounts to 25 hours or more a week for a period of time, they are reclassified as part-time employees and that approximately 20 employees during the six-month period prior to the hearing in this case have been so reclassified. At the date of the hearing, the record reveals that the Activity was contemplating reclassifying approximately 4 more "intermittent" employees to part-time.

should be excluded from any unit found appropriate because they do not enjoy certain of the employment benefits available to other employees. Moreover, the Activity contended, both at the hearing and in its brief, that all off-duty military personnel should be excluded because, with the exception of three who were designated as part-time, the remaining off-duty military personnel are classified as "intermittent;" they do not share a community of interest with other NAF employees; and their employment is only through individual employment contracts and only with the written permission of their Commanding Officer.

In all the circumstances, I find that the "intermittent" employees involved herein should be included in any unit found appropriate. Thus, the record reflects that employees in this classification have a reasonable expectation of continued employment; that a majority of the "intermittent" employees work for a substantial period of time during the year; 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. 10/ Moreover, for the reasons enunciated in Department of the Navy, Navy Exchange, Mayport, Florida, A/SLMR No. 24 and Army and Air Force Exchange Service, White Sands Missile Range Exchange, White Sands Missile Range, New Mexico, A/SLMR No. 25, I find that, once hired, off-duty military personnel stand in substantially the same employment relationship with the Activity as do other Activity employees and that their exclusion from the unit, because they are designated as "intermittent" employees or based on their military status, is unwarranted.

I am advised administratively that the unit found appropriate herein comprised of nonsupervisory "Category A" and "Category B" employees including "intermittent" employees in both categories, renders inadequate the SEIU's showing of interest. Accordingly, I shall dismiss the petition in the subject case. 11/

10/ In United States Army Special Services, Central Post Fund, Fort Benning, Georgia, A/SLMR No. 36, I found, based on the record in that case, that "intermittents" were employed on an emergency basis, and that, therefore, their exclusion from the petitioned for unit was warranted as they had no reasonable expectation of regular employment. In my view, the record in the instant case, establishes that employees classified as "intermittents" have a reasonable expectancy of continued employment, and that they have a community of interest with other NAF employees.

11/ In view of this disposition, I find it unnecessary to determine whether some 9 or 10 employees, who are classified as intermittent "Category A" employees, and who are employed as teachers and instructors, are professional employees within the meaning of the Order.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 40-3573 (RO-25) be, and it hereby is, dismissed.

Dated, Washington, D.C.
August 24, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

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

U. S. DEPARTMENT OF AGRICULTURE,
RICHARD B. RUSSELL RESEARCH CENTER
A/SLMR No. 189

The Petitioner, Local R5-148, National Association of Government Employees (Ind.)(NAGE), sought an election in a unit of all nonsupervisory Wage Board (WB) employees of the U. S. Department of Agriculture, Richard B. Russell Research Center, Southeastern Marketing and Nutrition Research Division, Athens, Georgia. The Activity contends that the unit sought is inappropriate because the WB employees in the claimed unit have a community of interest with General Schedule (GS) employees in their organizational division, as well as with employees of other organizational divisions at the Richard B. Russell Center.

The Assistant Secretary found that the unit sought was not appropriate for the purpose of exclusive recognition as the claimed employees lack a clear and identifiable community of interest separate and distinct from other employees of the Activity. In this connection, he noted the proposed unit does not constitute a grouping of craft employees, as it includes employees who range from janitors and laborers to skilled WG-10 mechanics and electricians; the claimed unit is not organizationally cohesive, since two of the WB employees are laboratory technicians assigned to specific laboratories rather than to the Plant Management Office; a number of the WB employees spend much of their time working in laboratories with GS employees from their own and other divisions as distinguished from other WB personnel who do not work with GS employees; and much of the work time of the claimed employees is spent following the designs and instructions of GS employees from their own and other divisions.

As the employees in the claimed unit did not share a clear and identifiable community of interest separate and distinct from other employees of the Activity and as such a fragmented unit could not reasonably be expected to promote effective dealings and efficiency of agency operations, the Assistant Secretary dismissed the petition.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF AGRICULTURE,
RICHARD B. RUSSELL
RESEARCH CENTER

Activity

and

Case No. 40-3521(RO 25)

LOCAL R5-148, NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES (IND.)

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 M. Hildreth. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Assistant Secretary finds:

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

2. The Petitioner, Local R5-148, National Association of Government Employees (Independent), herein called NAGE, seeks an election in a unit of all nonsupervisory Wage Board (WB) employees of the U.S. Department of Agriculture employed at the Richard B. Russell Research Center, Southeastern Marketing and Nutrition Research Division, Athens, Georgia, excluding all General Schedule (GS) employees, management officials, employees engaged in personnel work in other than a purely clerical capacity, supervisors, guards, and professional employees. 1/

The Activity contends the unit sought is inappropriate because the WB employees covered by the petition have a community of interest with the GS employees in the same organizational division, as well as with employees of other organizational divisions located at the Richard B. Russell Research Center.

1/ The unit appears as amended at the hearing. The parties by stipulation agreed also to exclude employees on temporary appointments of less than 180 days. In view of the disposition herein, it was considered unnecessary to make any finding with respect to such employees.

The Richard B. Russell Research Center (Center) is a regional research center of the Department of Agriculture, housing several organizational divisions. The record indicates that the largest group of employees at the Center, approximately 130-140, are assigned to the Southeastern Marketing and Nutrition Research Division. The remainder of the approximately 175 employees at the Athens, Georgia, facility are distributed among the Market Quality Research Division, the Transportation and Facilities Research Division, and the Soil and Water Conservation Research Division.

The approximately 32 WB employees in the claimed unit are part of the Southeastern Marketing and Nutrition Research Division. This Division is divided into various laboratories in addition to administrative subdivisions such as the Plant Management Office. The record reflects that all but two of the WB employees in the unit sought are, in fact, assigned to various segments of the Plant Management Office. 2/ The remaining two WB employees in the Division sought are WG-1 lab helpers, each assigned directly to one of the laboratories.

The Service Building, where the various plant management shops are located, is separate from the main building which contains the laboratories. However, the record shows that to varying degrees, some WB employees spend much of their time in the laboratories. Thus, the record reflects that one electrician and a refrigeration and heating mechanic spend approximately 90 percent of their time in the laboratories. It appears that the time WB employees work in the laboratory is divided among such functions as maintenance, repair of laboratory equipment, and fabrication of new equipment. Much of the fabrication work is performed by WB employees following designs and instructions of the GS employees.

Although some operations are located at the Center simply because of available space, 3/ others, such as the Market Quality Research Division and the Transportation and Facilities Research Division, work closely with the Southeastern Marketing and Nutrition Research Division. The record reflects that these latter three divisions are all under the direction of a Deputy Administrator for Marketing and Nutrition of the Agriculture Research Service, that they jointly contribute to various projects, and

2/ From the record, it appears that the Plant Management Office is divided into several shops and other divisions. Employed in these shops and divisions are boiler plant operators, refrigeration and air conditioning mechanics, and a janitor, all WB employees, ranging from WG-2 to WG-10. Also, there is a group of WG-1 to WG-3 janitors and laborers as well as WG-10 electricians, pipefitters, a welder and a mason.

3/ The parties agreed that the Activity's Soil and Water Conservation Research Division had no connection with other divisions at the Center, nor did other, so-called "tenant" organizations, such as a laboratory from a nearby university.

that in some instances, GS employees assigned to one of these divisions may be permanently located in the laboratory of another. In fact, the record shows that GS employees of one division have directed employees of other divisions in various projects.

Based on the foregoing, I find that the unit limited to WB employees in the Southeastern Marketing and Nutrition Research Division, as sought by the NAGE, is not appropriate for the purpose of exclusive recognition, as such employees do not share a clear and identifiable community of interest separate and distinct from other employees of the Activity. Thus, the record shows that the proposed unit does not constitute a grouping of craft employees, as it includes employees who range from janitors and laborers to skilled WG-10 mechanics and electricians; the claimed unit is not organizationally cohesive, since two of the WB employees are laboratory technicians assigned to specific laboratories rather than to the Plant Management Office; a number of the WB employees spend much of their time working in the laboratories with GS employees from their own and other divisions, as distinguished from other WB personnel who apparently do not work with GS employees; and much of the work time of some WB employees is spent following the designs and instructions of GS employees of the Southeastern Marketing and Nutrition Research Division and of other divisions located at the Center.

As the employees in the claimed unit do not share a clear and identifiable community of interest separate and distinct from other employees of the Activity and as such a fragmented unit could not reasonably be expected to promote effective dealings and efficiency of agency operations, I shall order that the NAGE's petition be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 40-3521(RO 25) be, and it hereby is, dismissed.

Dated, Washington, D. C.
August 24, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

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

ARMY AND AIR FORCE EXCHANGE SERVICE,
GOLDEN GATE EXCHANGE REGION,
STORAGE AND DISTRIBUTION BRANCH,
NORTON AIR FORCE BASE, CALIFORNIA
A/SLMR No. 190

This case involved a petition for amendment of certification (AC) filed by the Army and Air Force Exchange Service, Golden Gate Exchange Region, Storage and Distribution Branch, Norton Air Force Base, California. By its petition, the Activity sought to amend the name of the Activity designated in a prior certification and to add to the certified unit exclusions the job classifications: temporary full-time, temporary part-time and on-call. The certified labor organization, American Federation of Government Employees, AFL-CIO, Local 1485 (AFGE) took the position that the requested amendment should be granted because the amended certification would then accurately describe the unit as it is currently constituted.

The record revealed that the prior certification designated the Southern California Exchange Region (SCER) as the Activity in a unit which was composed of employees located in an office building and a warehouse. The record further revealed that while its scope had been diminished as a result of an agency reorganization, the certified unit still existed but under the administration of a different activity and that the certified labor organization was still willing and able to represent the employees in the unit. In these circumstances, the Assistant Secretary amended the certification to conform the recognition involved to the existing circumstances resulting from the change in the identity of the Activity precipitated by the agency reorganization.

With respect to the job classifications temporary full-time, temporary part-time and on-call, the Assistant Secretary stated that it would not effectuate the purposes and policies of the Order to amend the certification to add such classifications to the unit exclusions where, as here, the evidence established that there were no employees filling such classifications at the present time.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ARMY AND AIR FORCE EXCHANGE SERVICE,
GOLDEN GATE EXCHANGE REGION,
STORAGE AND DISTRIBUTION BRANCH,
NORTON AIR FORCE BASE, CALIFORNIA

Activity-Petitioner

and

Case No. 72-AC-2651

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

Labor Organization

DECISION AND ORDER AMENDING CERTIFICATION

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

Upon the entire record in this case, the Assistant Secretary finds:

The Petitioner, Army and Air Force Exchange Service, Golden Gate Exchange Region, Storage and Distribution Branch, Norton Air Force Base, California, herein called the Activity, filed the petition for amendment of certification (AC) in the subject case as a result of an agency reorganization. It seeks to amend the designation of the Activity named in the prior certification and to add to the exclusions from the certified unit the job classifications: temporary full-time, temporary part-time and on-call. The certification involved herein was issued by the Area Administrator on June 18, 1971 in Case No. 72-1528 designating American Federation of Government Employees, AFL-CIO, Local 1485, herein called AFGE, as the exclusive representative in the following unit:

> All regular full-time and regular part-time hourly and universal salary plan employees, including off-duty military personnel in either of these foregoing categories employed by the Southern California Exchange Region, Army and Air Force Exchange Service, Norton Air Force Base, excluding all casual employees, employees engaged in Federal

personnel work in other than a purely clerical capacity, professional employees, management officials and supervisors and guards as defined in the Order. 1/

By its petition in this case, the Activity proposes that the certification be amended to read:

> All regular full-time and regular part-time hourly pay plan employees, including off-duty military personnel in either of these foregoing categories, employed by the Golden Gate Exchange Region, Storage and Distribution Branch, Army and Air Force Exchange Service, at Norton Air Force Base, California excluding all temporary full-time, temporary part-time, on-call, and casual employees, supervisors, managers, personnel workers in other than a purely clerical capacity, professionals, guards and watchmen. 2/

The AFGE takes the position that the requested amendment of certification should be granted because the amended certification would describe accurately the unit as it is currently constituted.

The Reorganization

Prior to June 26, 1971, the Southern California Exchange Region, (SCER) was an administrative subdivision of the Army and Air Force Exchange Service, (AAFES), located as a tenant activity at the Norton Air Force Base in San Bernadino, California. At Norton Air Force Base, the SCER consisted of an office building which housed employees exclusively engaged in clerical and administrative functions and a warehouse which employed approximately 55 employees engaged in merchandise receiving, storing, and shipping functions. The unit as originally certified included eligible employees in both the office building and the warehouse. The record revealed that the warehouse was headed by a Warehouse Manager who reported to the SCER Chief of the Storage and Distribution Branch who, in turn, reported to SCER Region Chief.

Effective June 26, 1971, AAFES, pursuant to a nationwide agency reorganization, deactivated SCER. In connection with the reorganization, the record reveals that all of the employees of the SCER's office building were either terminated pursuant to a reduction-in-force or reassigned to other AAFES locations. However, the record reveals also that the SCER's deactivation in no way changed any of the working conditions of the employees of the SCER's warehouse. Rather, as to the latter facility, upon the SCER's deactivation, the warehouse was transferred administratively to the AAFES's Golden Gate Exchange Region (GGER) headquartered in San Francisco. Under this new arrangement, the Warehouse Manager now reports to the GGER Chief of the Storage and Distribution Branch who, in turn, reports to the GGER Region Chief. There is no evidence of transfer or interchange between the warehouse employees and any other AAFES employees. Further, the record reveals that the warehouse employees are in a separate bidding area from any other AAFES employees for purposes of promotion and in a separate area for purposes of reduction-in-force.

While the scope of the certified unit has been diminished due to an agency reorganization, the unit still exists under the administration of a different activity. Moreover, the certified labor organization is still willing and able to represent the employees in the unit. Accordingly, consistent with the positions of the parties, I shall amend the certification to conform the recognition involved to the existing circumstances resulting from the change in the identity of the Activity precipitated by the agency reorganization.

As noted above, by its AC petition in this matter, the Activity proposes also to add to those categories excluded from the certified unit, the job classifications: temporary full-time, temporary part-time, and on-call. 3/ In this connection, the record reveals that, at present, there are no employees in these classifications employed by the Activity and that, apparently, the employment of such employees in the future is speculative. 4/ Under such circumstances, I find that it would not effectuate the purposes and policies of the Order to amend a certification (more appropriately, clarify a unit) where, as here, the job classifications sought to be added to the unit exclusions are not, in fact, filled by employees. Thus, in the absence of facts relating to actual employees, the matter of deciding eliglibity questions on the basis of agency regulations and job descriptions becomes merely an academic exercise. Accordingly, the subject petition, insofar as it seeks to add certain additional exclusions, is hereby dismissed.

ORDER

IT IS HEREBY ORDERED that the certification in Case No. 72-1528,

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1/ This certification stemmed from a Decision and Direction of Election issued in Southern California Exchange Region, Army and Air Force Exchange Service, Norton Air Force Base, San Bernadino, California, A/SLMR No. 26.

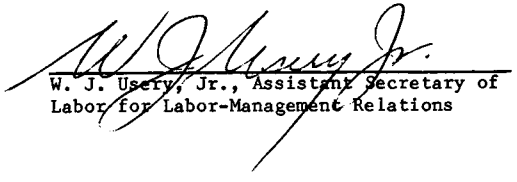
2/ At the hearing, the Activity amended its petition to eliminate the exclusion of "watchmen".

3/ In Southern California Exchange Region, Army and Air Force Exchange Service, Norton Air Force Base, San Bernadino, California, cited above, the AFGE sought to exclude, among others, employees classified as temporary full-time and temporary part-time from any unit found appropriate. However, because there was a lack of evidence in the record, I made no findings in this regard.

4/ While the record reveals that the Activity employs one employee classified as "temporary part-time military," it is clear and the Activity admits that such employee would be classified as regular part-time if he were not in the military.

issued June 18, 1971, be, and it hereby is, amended by substituting therein as the designation of the Activity, Army and Air Force Exchange Service, Golden Gate Exchange Region, Storage and Distribution Branch, Norton Air Force Base, California for Southern California Exchange Region, Army and Air Force Exchange Service, Norton Air Force Base. 5/

Dated, Washington, D. C.
August 24, 1972



W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

5/ While the petition in the subject case specified the exclusion of "managers" and "personnel workers in other than a purely clerical capacity", such exclusions appear to constitute inadvertent deviations from the standard exclusionary language contained in Section 10(b) of the Order. Accordingly, any deviation from the original certification in this connection was considered to be unwarranted. Nor was the deletion of the reference in the unit inclusions to "universal salary plan employees" by means of the instant AC petition deemed warranted.

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

ARMY AND AIR FORCE EXCHANGE SERVICE,
NORTON AIR FORCE BASE EXCHANGE,
NORTON AIR FORCE BASE, CALIFORNIA
A/SLMR No. 191

The subject case involved a representation petition filed by the National Federation of Federal Employees, Local 687, (NFFE) seeking a unit of all regular full-time and regular part-time Hourly Pay Plan (H.P.P.) and Commission Pay Plan (C.P.P.) employees, including off-duty military personnel in either of the foregoing categories, employed by the Norton Air Force Base Exchange at Norton Air Force Base, California. The Activity and the Intervenor, American Federation of Government Employees, AFL-CIO, Local 1485, (AFGE) were in agreement as to the appropriateness of the claimed unit.

In all the circumstances, the Assistant Secretary found that the petitioned for unit was appropriate. He noted that there was no interchange of employees between any of the components (including Norton Air Force Base Exchange) of the Southern California Area Exchange and that the Activity's employees are all subject to the same general working conditions and overall supervision, wage survey system, grievance procedures, leave policies, disciplinary policies, promotion policies, and benefits. In the Assistant Secretary's view, such an Activity-wide unit would promote effective dealings and efficiency of agency operations. Accordingly, he directed that an election be held in that unit.

The Assistant Secretary also found that temporary part-time and on-call employees should be excluded from the unit found appropriate. He noted that the record indicated that both categories of employees had no reasonable expectation of future employment, as temporary part-time employees were hired for a fixed duration and on-call employees filled in for regular employees during temporary absences. As there were no temporary full-time or casual employees presently employed at the Activity, he did not make any findings as to whether they would come within the excluded category of employees based on their job status at the Activity.

A/SLMR No. 191

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ARMY AND AIR FORCE EXCHANGE SERVICE,
NORTON AIR FORCE BASE EXCHANGE,
NORTON AIR FORCE BASE, CALIFORNIA 1/

Activity

and

Case No. 72-RO-2967(25)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 687

Petitioner

and

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

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 Roger D. Monreal. 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, National Federation of Federal Employees, Local 687, herein called NFFE, seeks an election in a unit of all regular full-time and regular part-time Hourly Pay Plan (H.P.P.) and Commission Pay Plan (C.P.P.) employees, including all off-duty military personnel in either of the foregoing categories, employed by the Norton Air Force Base Exchange at Norton Air Force Base, California, excluding temporary full-time and temporary part-time employees, casual and on-call employees, supervisory and managerial employees, employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees and guards. 2/ Both the Intervenor, American Federation of Government Employees, AFL-CIO, Local 1485, and the Activity agree that the unit sought is appropriate. 3/

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

The Unit

The Activity, Norton Air Force Base Exchange, located physically at Norton Air Force Base in California, is an administrative subdivision, along with seven other base exchanges, of the Southern California Area Exchange which has its headquarters at Norton Air Force Base. The Southern California Area Exchange is under the Golden Gate Exchange Region which includes the Activity along with 23 other base exchanges.

The mission of the Activity is to provide quality merchandise and service at reasonable prices to members of the military and authorized patrons on the premises of Norton Air Force Base. In charge of the Activity is an Exchange Manager who has overall responsibility for three main functions performed by the Exchange; retail operations, food operations, and service operations. In addition, the Exchange Manager is directly responsible for the Maintenance Section which has as its function the repair and maintenance of the Exchange facilities.

The Activity's three main functions are performed by 10 administrative subdivisions. Principal among these subdivions are the Main Retail Store which sells a full line of merchandise; the Four Seasons Retail Store which sells sporting goods, toys, and outdoor furniture; the Main Cafeteria; the Terminal Snack Bar, a 24-hour facility which sells sandwiches and drinks; and the Service Station which performs automobile repairs and dispenses gasoline. Each of the aforementioned facilities is headed by a manager who reports directly to the Exchange Manager. Among the employees in these facilities are retail sales clerks, customer service clerks, retail displayers, stock handlers, retail and food cashier-checkers, cooks, food service helpers, a food mobile unit operator, counter and snack stand attendants, and service station attendants. They are classified in one of the following categories: regular full-time, regular part-time, temporary part-time, and on-call.

2/ The foregoing unit description appears as amended at the hearing. The parties stipulated that the claimed unit was appropriate.

3/ The NFFE made a motion at the outset of the hearing to dismiss the Activity's initial objections to its proposed unit and requested that a consent election agreement meeting be directed. In view of the disposition of this case, I find it unnecessary to rule on the NFFE's motion.

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With respect to the duties of the employees in the unit sought, the evidence reveals that the retail operation employees perform sales and other related functions; the food service operation employees are engaged in the preparation and sale of food and beverages; and the service operation employees dispense gasoline and oil and perform minor vehicle repairs and tune-ups. 4/ These employees are all subject to the same general working conditions and overall supervision, wage survey system, grievance procedures, leave policies, disciplinary policies, and promotion policies. Availability of fringe benefits is governed uniformly by the employee's classification category (e.g., regular full-time, regular part-time, temporary part-time, and on-call).

Under all the circumstances, and noting the Activity-wide nature of the unit sought, the fact that there is no interchange of employees between any of the components of the Southern California Area Exchange and the fact that, with one exception, the Norton Air Force Base Exchange is separated geographically from the other base exchanges of the Southern California Area Exchange by distances which vary from 45 to 240 miles, I find that the claimed employees constitute an appropriate unit for the purpose of exclusive recognition as the evidence establishes that they share a clear and identifiable community of interest. 5/ I find, further, that such a unit will promote effective dealings and efficiency of agency operations.

Employee Eligibility

As noted above, the NFFE sought to exclude from its claimed unit employees classified as temporary part-time and on-call.

Temporary part-time employees are hired for an expected period of 90 days or less with a regularly scheduled workweek of at least 16 but not more than 35 hours. The evidence reveals that when employees in the temporary part-time category are employed, their expectancy is that their employment will terminate at the time specified. In these circumstances, as temporary part-time employees do not have a reasonable expectancy of continued employment for a substantial period of time, I shall exclude them from the unit found appropriate. 6/

4/ Maintenance Section employees report directly to the Exchange Manager and perform repair and maintenance duties for the various Exchange facilities. The Section consists of one (1) regular part-time employee and three (3) on-call employees.

5/ Cf. Army and Air Force Exchange Service, MacDill Air Force Base Consolidated Exchange, A/SLMR No. 29.

6/ See Army and Air Force Exchange Service, Fort Huachuca Exchange Service, Fort Huachuca, Arizona, A/SLMR No. 167.

I find also that on-call employees, who the record establishes fill in during temporary absences of regular employees, do not have a reasonable expectancy of future employment. Accordingly, I shall exclude them from the unit found appropriate. 7/

Based on the foregoing, 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 regular full-time and regular part-time Hourly and Commission Pay Plan employees, including off-duty military personnel in either of the foregoing categories, employed at the Norton Air Force Base Exchange, Norton Air Force Base, California, excluding temporary part-time and on-call employees, employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, management officials, and supervisors and guards as defined in the Order. 8/

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but no later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the National Federation of Federal Employees, Local 687; or by the American Federation of Government Employees, AFL-CIO, Local 1485; or by neither.

Dated, Washington, D.C.
August 24, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

7/ See Alaskan Exchange System, Base Exchange, Fort Greely, Alaska, A/SLMR No. 33.

8/ Inasmuch as the record establishes that there are no "temporary full-time" or "casual" employees presently employed at the Activity, I shall not at this time make any findings with respect to whether they properly come within the excluded category of employees based on their job status at the Activity.

August 24, 1972

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

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE
(HEW), HEALTH SERVICES AND MENTAL HEALTH
ADMINISTRATION (HSMHA), MATERNAL AND CHILD
HEALTH SERVICES AND FEDERAL HEALTH
PROGRAMS SERVICE
A/SLMR No. 192

Pursuant to the Decision and Remand of the Assistant Secretary in A/SLMR No. 108, a subsequent hearing was held in this case for the purpose of adducing evidence concerning the appropriateness of the units sought by American Federation of Government Employees, AFL-CIO, Local 41 (AFGE); the status of "temporary" employees; and the status and relationship of Public Health Service Commissioned Officers with respect to the employees in the petitioned for units. The units petitioned for by the AFGE included: (1) All professional and nonprofessional employees of the Maternal and Child Health Services (MCHS) of the Health Services and Mental Health Administration (HSMHA) located in Metropolitan Washington, D. C., of the Department of Health, Education and Welfare (HEW); and (2) all professional and nonprofessional employees of the Federal Health Programs Service (FHPS) of HSMHA located in Metropolitan Washington, D. C. The units together with other components of HSMHA are located in the Parklawn Building, Rockville, Maryland.

The Assistant Secretary found that neither of the units sought by the AFGE was appropriate for the purpose of exclusive recognition because in each instance the claimed employees do not possess a clear and identifiable community of interest separate and apart from the other employees at the Activity. In this connection, he noted that the 16 components of HSMHA operate under the highly centralized control of the Administrator; are highly integrated; the employees of the various components of the Activity, including those in the claimed units, work closely together in the various programs, special projects, details, task forces and committees which are established at the Activity level; and there are numerous instances of employee interchange between the various components, whenever the workload requires a component to seek additional help. He also noted that there is a central Personnel Office which handles personnel actions for all components of the Activity, including MCHS and FHPS; all employees of the Activity operate under the same uniform personnel procedures; the area of consideration for promotion, filling of job vacancies and reduction-in-force (RIF) is Activity-wide; in the case of a RIF, employees bump across component lines but employees who are RIF'ed are usually absorbed by another component; all employees have the same fringe benefits and grievance procedure; and labor relations are carried on at an Activity level with the component directors having little authority in the area.

In these circumstances, the Assistant Secretary found that the separate units proposed by the AFGE would artificially fragment the Activity and could not reasonably be expected to promote effective dealing and efficiency of agency operations.

The Assistant Secretary also found that members of the Commissioned Officer Corps of the United States Public Health Service properly should be excluded from any unit found appropriate as they do not constitute civilian Federal employees within the meaning of Title 5 of the United States Code.

In view of the foregoing, the Assistant Secretary ordered that the petitions be dismissed.

A/SLMR No. 192

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE (HEW), HEALTH SERVICES AND MENTAL HEALTH ADMINISTRATION (HSMHA), MATERNAL AND CHILD HEALTH SERVICES

Activity

and Case No. 22-2432

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 41

Petitioner

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE (HEW), HEALTH SERVICES AND MENTAL HEALTH ADMINISTRATION (HSMHA) FEDERAL HEALTH PROGRAMS SERVICE

Activity

and Case No. 22-2530

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 41

Petitioner

SUPPLEMENTAL DECISION AND ORDER

Upon petitions duly filed under Section 6 of Executive Order 11491, a consolidated hearing was held in the subject cases. Thereafter, on November 22, 1971, I issued a Decision and Remand, 1/ in which, among other things, I ordered that the subject cases be remanded to the appropriate Regional Administrator for the purpose of reopening the record to secure additional evidence concerning the appropriateness of the units sought; the status of "temporary" employees; and the status and relationship of Public Health Service Commissioned Officers with respect to the employees in the petitioned for units. On February 1 and 2, 1972, a further hearing was held before Hearing Officer Madeline E. Jackson. The Hearing Officer's rulings made at the reopened hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including the facts developed at the hearings held both prior and subsequent to the remand, and the briefs submitted by the parties and the Commissioned Officer Corps of the United States Public Health Service, I find:

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

2. In Case No. 22-2432, the American Federation of Government Employees, AFL-CIO, Local 41, herein called AFGE, seeks an election in the following unit: All headquarters nonsupervisory professional and nonprofessional employees of Maternal and Child Health Services, HSMHA, HEW, Metropolitan Washington, D. C., excluding supervisors, managment officials, guards, Public Health Service Commissioned Officers, and employees engaged in Federal personnel work in other than a purely clerical capacity.

In Case No. 22-2530, the AFGE seeks an election in the following unit: All headquarters nonsupervisory professional and nonprofessional employees of Federal Health Programs Service, HSMHA, HEW, Metropolitan Washington, D. C., excluding supervisors, management officials, guards, Public Health Service Commissioned Officers, employees engaged in Federal personnel work in other than a purely clerical capacity and occupational health nurses of Federal Health Programs Service. 2/

The Activity argues that a single unit consisting of the HSMHA headquarters, located in the Parklawn Building is an appropriate unit and that the two requested units, which are components of HSMHA, are inappropriate.

HSMHA, one of the six operating agencies of the Department of Health, Education and Welfare, was established on April 1, 1968. It is the health services delivery agency of the Federal Government. In January 1970, the various components of HSMHA, which had been in numerous buildings scattered throughout the Metropolitan Washington, D. C. area were moved into the Parklawn Building. The record indicates that a major purpose and justification for the move was to create a more efficient national health service program through the geographical consolidation of the interrelated elements of the health services program.

HSMHA, at the time of the remand hearing, was composed of 16 components divided into four main groupings: Prevention and Consumer

1/ A/SLMR No. 108

2/ The unit descriptions appear as amended at the remand hearing. The record does not indicate whether there are employees in the claimed units located outside the Parklawn Building, Rockville, Maryland.

Services; Health Services Delivery; Development; and Mental Health. The Maternal and Child Health Services (MCHS) and the Federal Health Programs Service (FHPS) are 2 of the 6 components under Health Services Delivery. HSMHA is headed by an Administrator who reports to the Assistant Secretary for Health and Scientific Affairs. The Administrator is responsible to the Office of the Secretary of HEW for the entire organization. All authority for HSMHA, both programatic and administrative, has been delegated to the Administrator by the Office of the Secretary of HEW, except that which may come directly by law to a component within the organization. 3/ While the Administrator has redelegated to the various component directors various authorities, the Administrator has overall responsibility for the activities of each component. Thus, the component directors report directly to the Administrator and he meets with component directors once a week to discuss any problems that have arisen. Further, the Administrator controls the manpower ceilings and budgets of each of the components and he determines the distribution of personnel and money throughout HSMHA. The Administrator also has the ultimate power to hire, fire, transfer, suspend and reassign employees although he has delegated some of these powers to the component directors. Grievances are handled by the component directors but the Administrator is the final reviewing authority. Additionally, the Administrator has final authority over the activities of the 10 Regional Health Directors of HSMHA and they report directly to him. In this regard, the component directors have no line authority to the staff of the Regional Health Directors.

The MCHS is charged with the specific responsibility of improving the quality and quantity of health services available to mothers and children in the United States. It administers an infant care program, children and youth programs and training and research programs. In Case No. 22-2432 the AFGE seeks a unit of some 52 employees in MCHS, including Home Economic Consultants, Nutrition Consultants, Speech Pathologists, Consultants, Writer-Editors, Research Analysts, Fiscal Assistants, Public Health Advisors and clericals.

The FHPS administers a hospital-clinic system composed of eight general hospitals and one specialty hospital, as well as 244 outpatient facilities. It also operates the Federal Employee Health Services and Emergency Health Services. In Case No. 22-2530 the AFGE seeks a unit of some 160 employees of FHPS, including Statisticians, Inventory Management Specialists, Management Information System Officers, Budget Analysts, Program Analysts, Writer-Editors, Public Information Specialists, Architects, Public Health Advisors and clericals.

3/ Even in the latter situation, the Administrator is still accountable for that component's activity. Each of the 16 components of HSMHA is headed by a program director who is directly responsible for the work performed by his component.

The record reflects that the operations of the various components of HSMHA are of a highly integrated nature and that the areas of expertise in each of the components overlap. The great bulk of work performed by HSMHA is derived out of its 24 programs and special projects. Some of these programs are continuing in nature and are constantly being implemented, while others are initiated for a specific purpose and are discontinued when particular goals are accomplished and replaced by new programs. These special projects and programs exist only at the HSMHA level. However, a component organization of HSMHA may be the lead component in a particular program if such program covers that component's specified area. For the most part, the components provide the staff which implements the various special projects and programs. The record indicates that both professional and nonprofessional employees of various components work on these programs or special projects and that when an employee is chosen for one of these programs or special projects, in many cases, he may be moved from his present office to one where other employees working on the project are located. For administrative purposes, the employee is still considered to be under the supervision of his own component supervisor, but for the duration of the program or special project he will, in fact, be under the supervision of the chairman of the task force who is involved in evaluations and promotions of the employees on the particular task force involved. In most cases, more than one employee from a component may be detailed to one of the special projects and programs. As a result of this system, there is substantial contact between certain employees of the different components and, in fact, the record reveals that the nature of the operation requires that the employees of the various components work closely together in order to attain the Activity's objectives in the most effective and efficient manner. 4/

Not only do the employees of the various components, including MCHS and FHPS, work together on the specific HSMHA programs and special projects but they also may work together on formal and informal details, task forces, work groups and committees. There also exists a system of borrowing employees when they are not needed in their component but may be needed in another component. In this regard, the record reveals that a number of employees in various job classifications, such as clericals, financial management employees and social science advisors, are utilized throughout the facility under detail arrangements. The evidence establishes that employees on detail may spend as much as 30 days on such assignments.

The record reveals there is a central Personnel Office at Parklawn which handles all HSMHA personnel matters, and it alone formulates personnel policy for all of HSMHA. 5/ The HSMHA components have no

4/ The record reflects that the MCHS at the present time has staff members on 17 programs or special projects and FHPS has staff members on 14 programs or special projects.

5/ The Parklawn Personnel Office handles also the personnel activities for the Food and Drug Administration which is housed also at Parklawn.

independent authority to issue or establish personnel policy and personnel files for all HSMHA Parklawn employees are maintained by the central Personnel Office. The evidence establishes that HSMHA components operate under the same merit promotion plan and the area of consideration under the plan includes, among others, all HSMHA employees at Parklawn and all job vacancies are posted on a Parklawn-wide basis. Moreover, the same reduction-in-force (RIF) procedure applies to all HSMHA Parklawn employees; bumping is across component lines; and the record reveals that no employees of Headquarters HSMHA have been terminated during a RIF but rather employees subject to RIF procedures have been absorbed by other components at Parklawn. The record shows also that employees of all the components at Parklawn receive the same fringe benefits, use the same cafeteria, and are under the same grievance procedure. Further, the central Personnel Office sponsors numerous training programs in which all HSMHA employees may participate and training is uniform and not geared to any program differences. The record reveals also that HSMHA has its own labor management relations program; that final authority in labor relations matters is at the HSMHA level; and that the component directors have neither the authority to negotiate with a labor organization nor to sign a negotiated agreement.

Based on the foregoing, I find that neither of the units sought by the AFGE is appropriate for the purpose of exclusive recognition because in each instance the claimed employees do not possess a clear and identifiable community of interest separate and apart from the other employees of HSMHA. Thus, the record reveals that all the components of HSMHA operate under the highly centralized control of the Administrator; that the operations of the various components of HSMHA are highly integrated; that the employees of various components of the HSMHA, including those in the claimed units, work closely together in the various programs, special projects, details, task forces and committees which are established at the Activity level; and that there are numerous instances of employees interchange between the various components, whenever the work load requires a component to seek additional help. Furthermore, the record reflects that HSMHA has its own central Personnel Office which handles personnel actions for all of its components including MCHS and FHPS; that all employees of HSMHA operate under the same uniform personnel procedures; that the area of consideration for promotion, filling of job vacancies and RIF is Activity-wide; and in case of RIF, employees may bump across component lines, but RIFed employees are usually absorbed by another component. In addition, all employees of HSMHA have the same fringe benefits and grievance procedure and labor relations are carried on at an Activity level with the component directors having little authority in this area. In these circumstances, I find that the separate units proposed by the AFGE would artificially fragment HSMHA and cannot reasonably be expected to promote effective dealings and efficiency of agency operations.

Finally, I find that members of the Commissioned Officer Corps of the United States Public Health Service properly should be excluded from any unit found appropriate as they do not constitute civilian Federal employees within the meaning of Title 5 of the United States Code.

In view of the foregoing, I shall order that the petitions herein be dismissed. 6/

ORDER

IT IS HEREBY ORDERED that the petitions in Case No. 22-2432 and in Case No. 22-2530 be, and they hereby are, dismissed.

Dated, Washington, D.C.
August 24, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

6/ In view of the disposition of this case, I find it unnecessary to pass on issue of the status of a number of "temporary" employees employed in both FHPS and MCHS.

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

DEPARTMENT OF TRANSPORTATION,
NATIONAL HIGHWAY TRAFFIC SAFETY
ADMINISTRATION
A/SLMR No. 193

The Petitioner, American Federation of Government Employees, AFL-CIO (AFGE), sought an election in a nationwide unit of all nonsupervisory General Schedule and Wage Board professional and nonprofessional employees of the Activity including those classified as temporary and part-time. The Activity consists of a headquarters in Washington, D. C., and ten geographic regions. The Activity agreed as to the appropriateness of the claimed unit. In addition, the parties were in agreement as to the inclusions and exclusions from the claimed unit.

Among the employees the parties would exclude from the unit, on the basis they were management officials, were 17 Program Analysts and Program Analysis Officers and 12 Management Analysts. The Assistant Secretary found, however, that the Management Analysts and the Program Analysts and Program Analysis Officers were not "management officials" within the meaning of the Executive Order, because they did not meet the criteria set forth in Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135. Thus, he found that the studies and analyses performed by these employees do not, in effect, extend beyond that of an expert or professional rendering resource information with respect to the policy in question. Moreover, the employees' role does not extend to the point of active participation in the ultimate determination as to what the policy, in fact, will be. Accordingly, the Assistant Secretary found that these employees were not management officials and would be included in any unit found appropriate.

As the Assistant Secretary was advised administratively that the addition of these employees to the claimed unit rendered inadequate the AFGE's showing of interest, he ordered that the petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF TRANSPORTATION,
NATIONAL HIGHWAY TRAFFIC SAFETY
ADMINISTRATION

Activity

and Case No. 22-2681 (RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Petitioner

DECISION AND ORDER

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

Upon the entire record in this case, including the Activity's brief, 1/ the Assistant Secretary finds:

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

2. The Petitioner, American Federation of Government Employees, AFL-CIO, herein called AFGE, seeks an election in a nationwide unit of all nonsupervisory General Schedule and Wage Board professional and nonprofessional employees of the Activity, including those classified as temporary and part-time, excluding supervisors, guards, intermittent employees, attorneys and law clerks employed in the Chief Counsel's

1/ Subsequently, the Activity filed a Motion to Amend Brief which was unopposed. In the circumstances, the Activity's Motion is hereby granted.

Office, confidential employees, management officials and employees engaged in Federal personnel work in other than a purely clerical capacity. 2/

The Activity and the AFGE are in agreement both as to the appropriateness of the claimed unit and as to the eligibility of employees. In this regard, they take the position that where, as here, there is no dispute between the parties with regard to the appropriateness of the unit or unit inclusions or exclusions, the Assistant Secretary is bound to accept the agreement of the parties. Moreover, the Activity maintains that the hearing in this matter should have been limited to the status of certain employees. 3/ For the reasons enunciated in Army and Air Force Exchange Service, White Sands Missile Range Exchange, White Sands Missile Range, New Mexico, A/SLMR No. 25, I reject the parties' contentions that the Assistant Secretary must accept the agreement of the parties as to the appropriateness of the unit sought or otherwise limit the scope of a hearing based on such agreement.

The National Highway Traffic Safety Administration is one of seven separate operating components of the Department of Transportation. There is no specific relationship among these components with each having its own functional administration. Each component reports directly to the Secretary of the Department of Transportation.

The mission of the Activity is to provide leadership and coordination with respect to motor vehicle and driver-related aspects of a national program to reduce driver, passenger, and pedestrian deaths and injuries, as well as property damage, on the nation's highways. Structurally, the administration of the Activity is accomplished through the efforts of two major operating programs, the Traffic Safety Program and the Motor Vehicle Program.

The Activity, which nationwide employs approximately 733 employees, consists of a headquarters in Washington, D.C., and ten geographic regions located throughout the United States. An Administrator, who directs and controls the program's objectives, activities, and performance, is assisted by a Deputy Administrator and five Associate Administrators.

2/ The unit appears as amended at the hearing. The record reveals that subsequent to the filing of the petition in the subject case, the Safety Systems Laboratory was brought under the Activity's jurisdiction, adding some 44 professional and nonprofessional employees to the Activity.

3/ Among the employees the parties would exclude from the unit are some 47 employees who the parties agree are management officials. In addition, the parties agreed that some 105 employees were supervisors and that a number of employees in certain job classifications were professionals.

The ten Regional Offices, which employ a total of some 90 employees, are each headed by a Regional Administrator who is responsible directly to the Administrator through the Deputy Administrator.

Among the 47 employees contended by the parties to be management officials and, therefore, excluded from the claimed unit, are 12 employees classified as Management Analysts and 17 employees classified as Program Analysts and Program Analysis Officers.

The record reveals that the Management Analysts are employed in the Office of Management Systems. This Office conducts management studies and makes determinations as to the functional effectiveness of organizational subdivisions of the Activity. Management Analysts perform management studies and functional analyses and are assigned to specific studies. Their recommendations are submitted to their immediate supervisors, who are the directors of the various offices. These supervisors, in turn, after review, submit the recommendations to the Associate Administrator for Administration before they are acted upon by the Administrator. Although in many instances it appears that the original concepts developed by the Management Analysts are retained, it appears that their recommendations undergo close scrutiny and are not necessarily accepted or acted upon without change. Moreover, it does not appear that they participate directly in the ultimate decision making process.

The record reveals that the employees classified as Program Analysts and Program Analysis Officers are assigned to the Office of the Associate Administrator for Planning and Programming as well as to the immediate offices of some other Associate Administrators and Office Directors. The Associate Administrator for Planning and Programming primarily is responsible for both the short and long-range planning of the Activity. He is an advisor to the Administrator and with other Associate Administrators, determines what the thrust of the Activity will be for the next two to five years. Program Analysts and Program Analysis Officers develop plans and programs and make recommendations in this regard which are submitted to their immediate supervisors, the directors of the offices involved. The directors review their recommendations and submit them to the appropriate Associate Administrator and ultimately to the Administrator. Program Analysts and Program Analysis Officers may attend meetings of the Associate Administrator for the purpose of supporting their recommendations. They also prepare evaluations of the progress and effectiveness of various substantive programs. Such evaluations generally are accomplished at six-month intervals, and include the preparation of cost, schedule and technical progress information. As in the case of Management Analysts, it appears that the recommendations of Program Analysts and Program Analysis Officers are subject to review and are not necessarily accepted or acted upon without change.

In Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135, I set forth the criteria to be used in determining whether an employee is a "management official" who should be excluded from a unit. In this connection, I found that a "management official" within the meaning of the Order is an employee having authority to make, or influence effectively the making of, policy necessary to the Activity with respect to personnel, procedures, or policy. I noted also that in making a determination in this regard consideration be concentrated on whether the role performed by such an employee is that of an expert or professional rendering resource information or recommendations with respect to the policy in question, or whether the employee's role extends beyond this to the point of active participation in the ultimate determination as to what the policy in fact will be.

In my view, the record in the subject case demonstrates that the Management Analysts and the Program Analysts and Program Analysis Officers are not management officials within the meaning of the criteria set forth above. Thus, the studies and analyses performed by these employees do not, in effect, extend beyond that of an expert or professional rendering resource information or recommendations with respect to the policy in question. Moreover, the employees' role does not extend to the point of active participation in the ultimate determination as to what the policy, in fact, will be.

Under these circumstances, I find that Management Analysts and Program Analysts and Program Analysis Officers are not management officials within the meaning of Section 10(b)(1) of the Order and, therefore, would be included in any unit found appropriate.

I am advised administratively that the addition of the 12 Management Analysts and the 17 Program Analysts and Program Analysis Officers renders inadequate the AFGE's showing of interest. 4/

Accordingly, I shall dismiss the petition in the subject case.

4/ My finding in this regard is based on the unit as initially petitioned for. In reaching the above finding as to the inadequacy of the AFGE's showing of interest, I have not tabulated those eligible employees of the Safety Systems Laboratory who apparently also would be included in the unit sought if an election were directed on an activity-wide basis.
In view of the above disposition, I find it unnecessary to reach the issue of whether Budget Analysts, Law Clerks and Attorneys, also considered by the Activity to be management officials, should be excluded from the unit. Moreover, in the circumstances, it was considered unnecessary to determine the alleged professional status of a number of employees of the Activity.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 22-2681 (RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
August 24, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

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

FEDERAL AVIATION ADMINISTRATION,
JACKSONVILLE AIR ROUTE TRAFFIC CONTROL CENTER
and
FEDERAL AVIATION SCIENCE AND TECHNOLOGICAL
ASSOCIATION, NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES, LOCAL R5-20
A/SLMR No. 194

This proceeding arose upon the filing of two unfair labor practice complaints by David Siegel, an employee of the Respondent Activity, Federal Aviation Administration, Jacksonville Air Route Traffic Control Center. The Complainant alleged that the Respondent Activity and the incumbent Respondent Union violated Section 19(a)(1) and (3) and Section 19(b)(1) of the Order, respectively, by negotiating and executing a collective-bargaining agreement at a time when the Union did not represent a majority of the employees in the bargaining unit and a question concerning representation existed.

Upon the completion of a consolidated hearing and the filing of briefs by all of the parties involved, the Chief Hearing Examiner issued a Report and Recommendations dismissing both complaints in their entirety.

Exceptions and a supporting brief were filed by the Complainant with the Assistant Secretary who, after considering this entire record, adopted the Chief Hearing Examiner's recommendations.

In this instance, the incumbent Union, in a timely fashion, had requested negotiation of an initial agreement with the Activity, and negotiations were properly carried out, culminating in a collective-bargaining agreement - all at a time when no real question concerning representation had been raised by any petition on file with the Department of Labor. The Assistant Secretary noted, in adopting the Chief Hearing Examiner's dismissal of the complaints, that the fact that the Complainant submitted to the Respondent Activity a petition, signed by a majority of unit employees stating that they did not wish to be represented by the Respondent Union, after the negotiated agreement had been signed with the Respondent Union on April 29, 1971, but before its approval at a higher agency level on July 15, 1971, would not require a contrary result. In reaching this conclusion, the Assistant Secretary specifically noted the language of the Study Committee's Report and Recommendations and Section 15 of the Order which states, in effect, that a negotiated agreement shall be approved at the agency level if it conforms to applicable laws and regulations.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL AVIATION ADMINISTRATION,
JACKSONVILLE AIR ROUTE TRAFFIC CONTROL CENTER

Respondent Activity

and Case No. 42-1672 (CA 26)

DAVID SIEGEL

Complainant

FEDERAL AVIATION SCIENCE AND TECHNOLOGICAL
ASSOCIATION, NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES, LOCAL R5-20 1/

Respondent Union

and Case No. 42-1673 (CO 26)

DAVID SIEGEL

Complainant

DECISION AND ORDER

On April 25, 1972, Chief Hearing Examiner H. Stephan Gordon issued his Report and Recommendations in the above-entitled proceeding finding that the Respondent Activity, Federal Aviation Administration, Jacksonville Air Route Traffic Control Center, and that the Respondent Union, Federal Aviation Science and Technological Association, National Association of Government Employees, Local R5-20, 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 Chief Hearing Examiner's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Chief Hearing Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of

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

the Chief Hearing Examiner's Report and Recommendations and the entire record in this case, including the exceptions and a supporting brief filed by the Complainant, I hereby adopt the findings, conclusions, 2/ and recommendations of the Chief Hearing Examiner.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 42-1672 (CA 26) and that the complaint in Case No. 42-1673 (CO 26) be, and they hereby are, dismissed.

Dated, Washington, D. C.
August 24, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

2/ The fact that the Complainant submitted to the Respondent Activity a petition, signed by a majority of unit employees stating that they did not wish to be represented by the Respondent Union, after a negotiated collective-bargaining agreement had been signed with the Respondent Union on April 29, 1971, but before its approval at a higher agency level on July 15, 1971, would not requre a contrary result. In this regard it was noted specifically in the Study Committee's Report and Recommendations that approval or disapproval of a negotiated agreement be based solely upon the agreement's conformity with laws and regulations. Further, Section 15 of the Order states that an agreement "shall be approved" if it conforms to applicable laws and regulations.

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF HEARING EXAMINERS
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
WASHINGTON, D. C.

FEDERAL AVIATION ADMINISTRATION,
JACKSONVILLE AIR ROUTE TRAFFIC CONTROL CENTER
Respondent Activity

and CASE NO. 42-1672(CA 26)

DAVID SIEGEL
Complainant

and

FEDERAL AVIATION SCIENCE AND TECHNOLOGICAL ASSOCIATION, NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R5-20 1/
Respondent Union

and CASE NO. 42-1673(CO 26)

DAVID SIEGEL
Complainant

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1/ Upon request of counsel for Respondent Union and upon stipulation by the parties, the Hearing Examiner, for the limited purpose of this record and this proceeding, granted a motion to reflect the full and correct name of the Respondent Union.

Before: H. STEPHAN GORDON, Chief Hearing Examiner

REPORT AND RECOMMENDATIONS

This proceeding, heard at Jacksonville, Florida, on January 18 and 19, 1972, arises under Executive Order 11491 (herein called Executive Order) pursuant to an Order consolidating these cases and a Notice of Hearing issued by the Regional Administrator of the Labor Management Services Administration, United States Department of Labor, Atlanta Region, on November 19, 1971, in accordance with Section 203.8 of the Regulations of the Assistant Secretary for Labor-Management Relations (herein called the Assistant Secretary). The proceedings were initiated by complaints filed by Complainant on July 19, 1971, alleging that the Respondent Activity and the Respondent Union negotiated a collective bargaining agreement at a time when both parties to this agreement had reasonable grounds to believe that the Respondent Union did not represent a majority of the employees in the bargaining unit and a real and substantial question concerning representation with regard to the employees in such unit existed, all in violation of Section 19; subsections (a)(1) and (3) and subsection (b)(1) of the Executive Order.

At the hearing all parties were represented by counsel and were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue orally and file briefs. Subsequent to the hearing, all parties did file timely briefs with the Hearing Examiner.

Upon the entire record in this matter, from observation of the witnesses and after due consideration of the briefs filed by the parties, I make the following findings and conclusions:

I. Issues

The material facts in this case are neither complex nor seriously disputed by the parties. However, the inferences as well as the legal conclusions to be drawn from these facts pose the following legal issues:

1. Did the Activity violate Section 19(a)(1) and (3) of the Executive Order by negotiating a collective bargaining agreement with the Respondent incumbent exclusive bargaining representative at a time when the Activity may have had reasonable cause to believe that a question concerning representation existed?

2. Did the Activity violate Section 19(a)(1) and (3) of the Executive Order by ratifying and executing the negotiated agreement referred to above, at a time when it may have had reasonable cause to believe that the Respondent Union did not represent a majority of the employees in the Unit?

3. Did the Respondent Union violate Section 19(b)(1) of the Executive Order by negotiating and/or executing a collective bargaining agreement with Respondent Activity at a time when the Respondent Union may not have represented a majority of the employees in the unit wherein it was recognized as the exclusive bargaining representative?

The legal issues thus posed are questions of first impression for the Assistant Secretary.

II. Facts

Since the pertinent facts in this case are fairly numerous and range over a rather prolonged period of time, I believe a chronological description of events would be helpful.

Chronology

November 29 - December 8, 1965	An election is conducted pursuant to Executive Order 10988 in order to determine whether the employees in question wish to be represented by the Respondent Union (hereinafter referred to as NAGE).
December 14, 1965	NAGE is granted exclusive recognition under Executive Order 10988 in a unit of Air Traffic Control Specialist at the FAA Air Route Traffic Control Center, Hilliard, Florida (herein called the Center).
July 5, 1967	NAGE is granted exclusive recognition under Executive Order 10988 in a separate unit of Teletype operators at the Center.

December 4, 1967	The above described unit is expanded to include non-supervisory Flight Data Aides at the Center.
February 1970	Professional Air Traffic Controller Organization, affiliated with Marine Engineers Beneficial Association, AFL-CIO (herein called PATCO), files a petition for exclusive certification in a nation-wide unit of non-supervisory Air Traffic Control Specialists.
January 29, 1971	The Assistant Secretary in Case No. A/SLMR No. 10 debars PATCO, because of certain prior illegal strike activity on its part, as an employee representative under the Executive Order for an indefinite period of time and orders all pending petitions and unfair labor practice complaints filed by or on behalf of PATCO to be dismissed. Such debarment, under the Assistant Secretary's decision, was to be in effect until such time as PATCO could demonstrate to the Assistant Secretary's satisfaction that it had complied with his Decision and Order and that it would in the future comply with the provisions of the Executive Order.
February 24, 1971	Marvin Diedrick, an individual, files a petition to decertify NAGE as the exclusive representative for the employees at the Center.
March 15, 1971	NAGE submits written bargaining request and a proposed collective bargaining agreement to the Center.
March 1971	NAGE's request to bargain is rejected by the Activity on grounds that the Activity could not engage in collective bargaining while NAGE's status was being challenged by the decertification petition filed on March 15, 1971.
March 26, 1971	The decertification petition filed by Marvin Diedrick is dismissed by the Atlanta Regional Administrator because petitioner failed "to submit the showing of interest required by Section 202.(b)(2) of the Regulations of the Assistant Secretary."
April 8, 1971	Appeal period from dismissal of decertification petition expires. No appeal is filed.
April 8, 1971	Activity and NAGE agree to start contract negotiations on April 26, 1971.
April 26, 1971	Collective bargaining negotiations between the Activity and NAGE commence.
April 26, 1971	Complainant, while attending a PATCO convention in Atlanta, Ga., notifies the Chief of the Center, Mr. James Pound, by long-distance telephone that he is forwarding a petition allegedly signed by approximately 175 employees expressing their desire not to be represented by NAGE. In the same telephone conversation, and based on the referred-to petition, Complainant also request that the Activity refrain from entering into any agreement with NAGE. While this telegram was sent on April 26, 1971, and received on April 27, 1971, no list of signatures was submitted to the Activity.

April 27, 1971	Negotiations between the Activity and NAGE are concluded and the resulting collective bargaining agreement is signed by NAGE.
April 29, 1971	The collective bargaining agreement is signed by the Respondent Activity.
Early May 1971	The Collective Bargaining Agreement is forwarded by the Center to Washington officials for review.
May 10, 1971	Complainant files charge in the instant proceeding. Attached to the letter charging the Activity with the violations litigated in the instant case is the signed petition referred to by Complainant in his phone call and telegram of April 26, 1971.
June 4, 1971	The Assistant Secretary in a Supplemental Decision and Order A/SLMR No. 51, reinstate PATCO's status as a labor organization, thereby permitting it to utilize the procedures under the Executive Order.
June 7, 1971	PATCO files petition for Certification of Representative in a nation-wide unit of non-supervisory Air Traffic Controllers.
June 22, 1971	In a meeting called for the purpose to attempt to settle informally the complaint against the Activity, Complainant submits another list containing the signatures of 214 employees expressing their desire not to be represented by NAGE and requesting that no collective bargaining agreement be entered into between the Activity and NAGE.

June 26, 1971	FAA officials in Washington complete their review of the collective bargaining agreement negotiated April 26 - 27, and forward it to FAA's Southern Regional Office for required approval and signature.
July 15, 1971	The collective bargaining agreement is approved, signed and executed by the Federal Aviation Administrator's designee.

III. Findings and Conclusions

A. Did the Activity violate Section 19(a)(1) and (3) of the Executive Order by negotiating a collective bargaining agreement on April 26-27, 1971.

NAGE's original bargaining request was transmitted to the Activity on March 15, 1971. It is undisputed and I so find that at that time NAGE was the exclusive bargaining representative for the employees involved. Moreover, it is clear from the record that NAGE at the time it submitted its bargaining request, and at all times pertinent to this decision, was a viable labor organization representing the employees in the unit concerned. While its activities on behalf of the employees it represented may have been limited in scope, the record adequately demonstrates that it represented the employees in a variety of matters on a continuing basis. It follows, therefore, that NAGE's request to negotiate a collective bargaining agreement was clearly within its authority. A refusal by the Activity to negotiate such an agreement absent some intervening circumstances, would have been a clear unfair labor practice under the Executive Order. The intervening circumstance in the instant case was the pendency of a decertification petition filed by Marvin Diedrick on February 24, 1971. In view of the unresolved representation question raised by that petition, the Activity quite properly refused to negotiate with NAGE at that time. However, when that obstacle was removed by the Regional Administrator's dismissal of the Diedrick decertification petition because the petitioner "failed to submit the [required] showing of interest," the Activity properly honored NAGE's request to commence bargaining negotiations. It must be remembered that at that time PATCO had lost its status as a labor organization and no rival organization was in the picture. Moreover, PATCO had been debarred as a labor organization for an indefinite period of time, and neither the Activity nor NAGE had any way of knowing if or when PATCO would regain its status as a labor organization under the Executive Order. Although it is clear from the record that all parties were fully aware of the fact that PATCO actively continued to organize not only the employees at the Jacksonville FAA facility but was actually seeking recognition in a nation-wide unit of Air Traffic Controllers, the fact remains that PATCO's petition for certification in such a unit had been dismissed and no one could foretell with any degree of certainty when or, indeed if, PATCO would regain its status as a labor organization under the Executive Order and thus be able to refile its petition. I therefore find that under these circumstances,

PATCO's organizational activity did not raise a valid question concerning representation and did not preclude NAGE and the Activity from negotiating and entering into a collective bargaining agreement. Quite to the contrary, a refusal to bargain with NAGE by the Activity on so tenuous a ground that an entity which was not a labor organization under the Executive Order was attempting to organize its employees would, in my opinion, have been a clear violation of the Executive Order and would have subjected the Activity to unfair labor practice charges by NAGE.

There are allusions in the record and in the brief filed by Complainant that the only reason NAGE and the Activity engaged in collective bargaining at this particular time was their desire to avail themselves of the fortuity that PATCO had temporarily lost its labor organization status, was therefore unable to file any petition which would have raised a valid question concerning representation, and the Activity and NAGE wished quickly to sign a collective bargaining agreement which would constitute a bar to any PATCO petition filed if and when PATCO regained its status as a labor organization. This contention by Complainant is not without foundation. Thus, the parties maintained a ralationship for over five years without the necessity of a written collective bargaining agreement. The local president of NAGE consistently believed that a written agreement was not only unnecessary, but, indeed, not desirable. It was only when PATCO lost its standing as a labor organization, but nevertheless engaged in rather vigorous and apparently some successful organizational activities, that NAGE suddenly wished to cement its standing with a collective bargaining agreement. When these circumstances are coupled with the fact that the agreement which emerged resulted from scarcely two days of negotiations and failed to contain any substantive provisions with respect to grievances or other working conditions, the inference may well be drawn that this agreement was to serve a purpose other than merely to delineate hours and conditions of work. Yet the only other purpose this agreement could have served was to constitute a bar to any rival petition for certification. Nor do I credit the testimony of NAGE's local president that he was not aware of the fact that this agreement would constitute a bar to any certification petition. In the course of his testimony, this witness testified that he possessed considerable expertise in labor-management relations; that he had attended various lectures and seminars in labor-management relations; that in view of this expertise he was able to draw up, unaided, the proposed collective bargaining agreement; and that he did consult during this period with national officials of NAGE. It stretches credulity too far to believe that under these circumstances a long-term president of a local union did not understand the practical consequences which would flow from the course of action he set in motion.

However, even assuming that NAGE's actions were motivated by its desire to perpetuate its status as the exclusive bargaining representative in the unit involved and to prevent any legal challenge of that status for the duration of the contract, I find that its action was not illegal. The exercise of legal rights does not become tainted merely because it serves the interest of the party seeking refuge in the law; nor does it become illegal because it may work to the future detriment of another party.

Neither do I find a collusive practice between NAGE and the Activity to deprive PATCO of the opportunity to challenge NAGE's status as the exclusive representative. As already noted above, PATCO, at the time of the negotiations, was a viable labor organization and a refusal to negotiate would not only have subjected the Activity to unfair labor practice charges, but would, in my opinion, have constituted an unfair labor practice on part of the Activity. It is also interesting to note that the only real issue in dispute during the negotiations was the duration of the contract. Thus, NAGE desired a two-year contract, while the Activity insisted, and eventually prevailed, in limiting the agreement to a one-year term. It is logical to assume that had there been collusion between the parties to the agreement to deprive a reactivated PATCO from challenging NAGE's status, that self-interest would have dictated immediate agreement on the longest possible contract term, since during the duration of the contract no rival petition could be entertained. Yet despite this, the Activity, which was represented at the bargaining table by expert staff who had considerable familiarity with the legal technicalities and consequences flowing from their action, insisted on a one-year agreement. Such action, I find, is inconsistent with an assumption that the Activity engaged in collusion with NAGE to perpetuate the latter's incumbency or to deprive its employees of the opportunity to choose another bargaining representative at the earliest possible opportunity.

This being a case of first impression before the Assistant Secretary, Counsel for Complainant in his arguments relies heavily on the applicable law in the private sector as enunciated by the National Labor Relations Board. Thus, in Midwest Piping and Supply Co., 63 NLRB 1060 (1945), the National Labor Relations Board laid down the salutory principle that an employer commits an unfair labor practice by negotiating a contract with one union when another union had made conflicting representation claims and thereby raised a "real question of representation." In the face of such conflicting majority representation claims, the Board held, the employer could not legally "arrogate to itself the resolution of the representation dispute." As counsel for Complainant states quite correctly in his brief, the

Board's reasoning is bottomed on the legal mandate of Section 8(a)(2) of the National Labor Relations Act which requires an employer to remain neutral in the contest between rival labor organizations. In 1958, the National Labor Relations Board extended the principle enunciated in the Midwest Piping case (supra), to situations where, as in the instant case, an employer, in the face of a rival claim, negotiates a contract with a union holding exclusive representation status. Shea Chemical Corp., 121 NLRB 1027.

While the Assistant Secretary is, of course, not bound by National Labor Relations Act law in the private sector and certainly is not bound by interpretations of that law by the National Labor Relations Board, the principles enunciated in Midwest Piping and Supply Co., supra, and Shea Chemical Corp., supra, as well as the rationale therefore, appear equally applicable to labor-management relations in the public sector. Certainly, the substantive provisions of the Executive Order closely track those of the National Labor Relations Act; and the procedural rules promulgated by the Assistant Secretary are in many respects analogous to those of the National Labor Relations Board. Complainant's reliance, therefore, on the National Labor Relations Board's holding in Midwest Piping and Shea Chemical are not misplaced. Quite to the contrary, I find that the underlying rationale of these cases are equally relevant to cases arising under the Executive Order and should be adopted by the Assistant Secretary.

However, while accepting the rationale of these cases, I find that they are clearly distinguishable on the facts. Thus, unlike in Midwest Piping or in Shea Chemical, no question concerning representation, either real, substantial, or valid, existed at the time NAGE and the Activity engaged in collective bargaining and signed a collective bargaining agreement. A solitary phone call and telegram from one individual employee claiming to represent another 175 dissident employees, without further proof or documentation, and in the absence of a rival claimant to the exclusive bargaining representative, does not, in my opinion, raise a question concerning representation as envisioned by Midwest Piping or Shea Chemical so as to preclude the employer and the incumbent union from negotiating a collective bargaining agreement. Quite to the contrary, had the Activity relied on such meager evidence and had it refused to bargain with NAGE for that reason, it would, in my opinion clearly have violated the Executive Order.

For these reasons I find that the Activity did not violate the Executive Order when it negotiated and signed a collective bargaining agreement with NAGE during the period April 26-29, 1971.

B. Did the Activity violate Section 19(a)(1) and (3) of the Executive Order by ratifying and executing the agreement negotiated with NAGE?

The collective bargaining agreement negotiated between NAGE and the Activity and signed by the parties on April 27 and April 29, 1971, respectively, did by its own terms as well as the provision of Section 15 of the Executive Order, not become effective until approved and ratified by the head of the agency or an official designated by him. Thus, Section 1, Article VIII of the agreement provides: "This Agreement shall become effective on the date it has been approved by the FAA Administrator or an official designated by him." Section 15 of the Executive Order provides in pertinent part:

> "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. . . ."

Pursuant to these requirements, the agreement was forwarded to the Activity's Washington headquarters in early May, 1971 for review and approval.

This review was completed by June 26, 1971, at which time the agreement was sent to FAA's Southern Regional Office for the purely ministerial act of signing the agreement. Final ratification and execution of the agreement occurred on July 15, 1971.

Based on the terms of the agreement itself; the requirements of Section 15 of the Executive Order; the interpretation which the parties themselves give to these factors; and the record herein, I find that for purposes of this case the collective bargaining agreement between the Activity and NAGE became effective on July 15, 1971.

However, between the period of April 29, 1971 when the agreement was executed at the Center and July 15, 1971, when it was approved and ratified, three events took place which are relevant to this case and which pose the question whether the ratification and execution of the agreement, as opposed to its original negotiation, constitutes an unfair labor practice. These events were:

1. On June 4, 1971, the Assistant Secretary reinstated PATCO as a labor organization and permitted it to utilize the procedures of the Executive Order;

2. On June 7, 1971, PATCO filed a certification petition in a nationwide unit of air traffic controllers; and

3. On June 22, 1971, Complainant, in a settlement conference, submitted to the Activity a list containing the signatures of 214 employees who expressed their wish not to be represented by NAGE.

a. The Effect of the PATCO Petition for Certification

The first question posed by these intervening events is whether the petition for certification filed by PATCO on June 7, 1971 raised a real question concerning representation, and whether in the face of this, the Activity should have ratified the contract then pending review at FAA headquarters in Washington, D. C. It is clear that under established law in the private sector and under the doctrine of Midwest Piping, supra, and Shea Chemical Corp., supra, the applicability and acceptance of which I recommended earlier in this decision, the petition filed by PATCO would have been timely; that it would have raised a real and valid question concerning representation and that the execution of the agreement in the face of such a timely filed petition would constitute an unfair labor practice. However, Section 15 of the Executive Order, quoted supra, injects an element into the collective bargaining process in the public sector which is not present in the private sector; i.e. it requires that any agreement negotiated with a labor organization be made "subject to the approval of the head of the agency or an official designated by him." As a direct consequence of this requirement, the Assistant Secretary's Rules and Regulations, Section 202.3(c), provide in pertinent part that:

> "When there is an agreement covering a claimed unit, a petition for exclusive recognition or other election petition will not be considered timely if filed during the period within which that agreement is in force or awaiting approval at a higher management leval . . . (Emphasis supplied.)"

Neither Section 15, of the Executive Order nor the above quoted provision of Section 202.3(c) of the Assistant Secretary's Rules and Regulations have any counterpart in the private sector and certainly were not contemplated by the National Labor Relations Board when it enunciated the Midwest Piping principle. It follows, that even if the Assistant

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Secretary were to accept fully the holding and the rationale of Midwest Piping and Shea Chemical Corp., supra, that an exception to these principles would have to be carved out in order to accommodate Section 15 of the Executive Order. Section 202.3(c) does exactly that. I further find that the language of Section 202.3(c) is clear and unambigous and should be given its intended meaning.

Counsel for Complainant argues in his able brief that Section 202.3(c) should be interpreted more narrowly and should be applied only to those situations where a locally signed agreement becomes effective, by its terms, upon execution by the negotiating parties. Conversely, Complainant argues, Section 202.3(c) should not be applied where, as in the instant case, the agreement, by its terms, is not effective until approved and signed by higher agency officials. I find this interpretation to be strained and not in keeping with the clear intent of Section 15 of the Executive Order or Section 202.3(c) of the Assistant Secretary's Rules and Regulations. Moreover, such an interpretation would leave it to the negotiating parties what effect should be given to Section 15 of the Executive Order or to Section 202.3(c) of the Rules and Regulations; it would, in effect, make the Assistant Secretary's Rules and Regulations a bargainable subject; and could, in considerable measure, circumvent the requirement of Section 15 of the Executive Order.

Particularly in the absence of any contrary interpretation by the Assistant Secretary, I am constrained to find that under Section 202.3(c) of the Assistant Secretary's Rules and Regulations, PATCO's petition of June 7, 1971 was not timely filed with respect to the employees in the unit involved in the instant case; that it did not raise a real question concerning representation regarding the employees in such unit; and that the petition did not preclude the Activity from completing the collective bargaining process, i.e. the review, approval and ratification of the agreement. To the contrary, I find that a refusal by the Activity to ratify the agreement on the ground that the PATCO petition raised a question concerning representation would, in the face of Section 202.3(c), have constituted an unfair labor practice under the Executive Order.

b. The Effect of the Disaffiliation Petition

As more fully explicated above, I have found that none of the events, either prior to the negotiation of the contract nor those which followed the negotiations, raised a real or valid question concerning representation which would have warranted a refusal to bargain by the Activity or a refusal by the Activity's headquarters in Washington to refuse to ratify the negotiated agreement. Such National Labor Relations Board cases as Pittsburgh Valve Company, 114 NLRB 193 (1955);

Woodmere, Inc., 175 NLRB No. 69, (71 LRRM 1046); (1969); Hart Motor Express, Inc., 164 NLRB 382 (1967); and National Carbon Division, 105 NLRB 441, upon which counsel for Complainant relies in his brief, are upon closer study clearly distinguishable on their facts; not applicable to the instant case; and not inconsistent with the result herein.

There remains, however, the question whether the Activity violated the provisions of the Executive Order by ratifying and approving the contract after it was put on notice on June 22, 1971 that a majority of the employees in the unit had signed a petition renouncing NAGE as their collective bargaining representative.

As noted in the chronology, supra, on June 22, 1971 representatives of the Activity met with Complainant and his representatives in an effort to resolve informally the complaint against the Activity. In the course of that meeting, Complainant submitted a petition containing the signatures of 214 employees declaring that they did not wish to be represented by NAGE. While the total number of employees in the unit was never clearly defined, the record establishes that the largest possible number of employees in the unit at the times relevant herein was approximately 384. The 214 signatures, therefore clearly constituted a majority of the employees in the unit.

The question arises, therefore, whether this petition constituted sufficient notice to the Activity that it may be dealing with a minority union and whether the Activity was under any obligation to withhold ratification of the contract under these circumstances.

There appears some conflicting testimony whether the reviewing officials in Washington were aware of the existence of this petition, although one FAA official testified that to the best of his recollection, the list was forwarded to Washington from its Atlanta Regional Office. However, based on the record testimony of Mr. E. L. Jack Embrey, Chief of the Union-Management Relations Division, Office of Labor Relations, for FAA, it would appear that such knowledge would not have affected FAA's decision to ratify the contract. In taking this position, the Activity relies on the Assistant Secretary's Rules and Regulations 202.3(d) which states:

> When a challenge to the representation status of an incumbent exclusive representative has been filed not more than ninety (90) days and not less than sixty (60) days prior to the terminal date of an agreement, and such challenge is subsequently dismissed or withdrawn, the activity and incumbent exclusive representative shall be afforded a ninety (90) day period free from rival claim within which to consummate an agreement. (Emphasis supplied.)

The Respondent Activity contends that the dismissal of the Diedrick decertification petition on March 26, 1971, triggered the 90-day "free" period during which it could consummate an agreement without interference from any rival organization. The Activity's reliance on this Rule is misplaced on several grounds. In the first place, the rule, by its clearly stated terms, applies only to situations where a petition is dismissed within the 90-60 day period preceding the expiration of an existing agreement. No such agreement was in existence at the time of the dismissal of the Diedrick petition. Therefore, the rule is clearly inapplicable. In the second place, at the time the agreement was finally executed on July 15, 1971, more than 90 days had elapsed since the dismissal of the Diedrick petition on March 26, 1971 and, therefore, even if the rule were applicable, it would not be operative. Thirdly, the question posed is not whether the parties were entitled to negotiate an agreement free from rival claims, but whether the Activity had reasonable cause to believe that it was entering into an agreement with a minority union. The fact that such an inquiry was not irrelevant is supported by the testimony of Mr. Embrey that prior to negotiating a contract even with an incumbent exclusive representative, the Activity would inquire into the "viability" of such union. If it was determined that the union, though it possessed exclusive representation status, was no longer "viable," the Activity would refuse to bargain and file an "R" petition in order to determine the union's representative status. It is reasonable to assume that the question of "viability" of a union would also encompass the majority status of such a union.

Counsel for Complainant argues that the above described facts clearly constitute a violation on the basis of the U. S. Supreme Court's rationale in International Ladies' Garment Workers' Union (Bernhard-Altmann) v. N.L.R.B., 366 U.S. 731 (1961). In that case, the Supreme Court in interpreting Section 8(a)(2) and Section 8(b)(1)(A) of the National Labor Relations Act, held that an employer commits an unfair labor practice when he recognizes and negotiates a contract with a union which represents only a minority of the employees in the unit. The Court further ruled that the fact that the employer entertained a bona fide but mistaken belief that the union represented a majority of the employees was not a defense to the violation found.

While I believe that the Bernhard-Altmann rationale is equally applicable to labor relations in the public sector generally and to the Executive Order specifically, I believe that there are circumstances present in the instant case which distinguish this case from Bernhard-Altmann. Thus, in the Bernhard-Altmann case, the Court dealt with a situation where a minority union was originally granted recognition, while in the instant case, NAGE was an incumbent union which had gained exclusive

representation status through the election machinery of the Executive Order. Moreover, in the instant case the exclusive representation status of NAGE was challenged through the machinery of the Executive Order only three and one-half months prior to the ratification of the contract through the Diedrick decertification petition and such challenge had failed. 2/ As a matter of fact, the original request to bargain was refused by the Activity on the very ground that a decertification petition was pending; and only when NAGE's exclusive representation was reaffirmed through the dismissal of the decertification petition, did the Activity commence collective bargaining negotiations. It would therefore appear that, unlike in Bernhard-Altmann, the Activity took every reasonable precaution before it agreed to enter collective bargaining negotiations. Moreover, the evidence of a possible loss of majority status was brought to the Activity's attention long after the bargaining negotiations had been concluded and the negotiated contract was pending approval in Washington, D. C. In this respect, I believe, it is also important to note that the alleged loss of majority did not occur until after the bargaining negotiations had been concluded. The record is devoid of any evidence that NAGE failed to represent a majority during the negotiations. Thus, the earliest dated signature appearing on the petition submitted

2/ I have taken into consideration Mr. Diedrick's testimony that he was allegedly informed by an unidentified individual in the Assistant Secretary's Miami Regional Office that the decertification petition had been dismissed because it failed to meet certain technical requirements and that he conveyed this information to the Activity. However, Mr. Diedrick's testimony in this regard was so vague both as to the actual information conveyed to him as well as to the identity of the individual who conveyed this information that little weight can be attached to it. This is particularly so when his testimony is weighed against the official notification of the dismissal of the petition by the Regional Administrator which specifically states that ". . . it does not appear that further proceedings are warranted at this time inasmuch as petitioner has failed to submit the showing of interest required by Section 202.(b)(2) of the Regulations of the Assistant Secretary." Mr. Diedrick himself testified that he was so confused by the information he received from the unidentified source in the Miami office that he took no further steps to either appeal the decision of the Regional Administrator or to perfect the petition previously filed. Under these circumstances, I find that whatever information Mr. Diedrick conveyed to the Activity, the Activity was entitled to rely on the official and unambiguous notification of the Regional Administrator rather than the ambiguous and confused explanation which Mr. Diedrick testified to and which emanated from an unidentified individual in the Miami office.

on June 22, 1971 is June 6, 1971, almost eight weeks after negotiations between NAGE and the Activity had been concluded

While the issue is not free from doubt, I find that under the circumstances of this case, and particularly in view of the fact that the parties commenced negotiations in reliance of the Assistant Secretary's dismissal of a decertification petition, the Activity's ratification of the contract without investigating further the possible defection of a majority of the employees in the unit at a time when the contract had already been negotiated did not constitute a violation under Section 19(a)(1) and (3) of the Executive Order.

C. Did the Respondent Union violate Section 19(b)(1) of the Executive Order by negotiating and/or executing a collective bargaining agreement with the Activity at a time when it may not have represented a majority of the employees in the unit?

As already pointed out above, the record is devoid of any evidence that at the time of the collective bargaining negotiations between NAGE and the Activity, NAGE failed to represent a majority of the employees in the unit. Moreover, there is nothing in the record to show that the petition indicating possible employee defection from NAGE which was communicated to the Activity on June 22, 1971, was ever communicated to the Activity on June 22, 1971, was ever brought to NAGE's attention. Whatever liability attaches to NAGE would have to be premised on the rationale of Bernhard-Altmann, supra, that the recognition of and bargaining with a minority union is a per se violation. Having found that, under the circumstances of this case, the Activity did not commit an unfair labor practice by ratifying the previously negotiated agreement, it must necessarily follow that NAGE did not violate Section 19(b)(1) of the Executive Order by being a party to such agreement.

RECOMMENDATION

For the reasons explicated above, it is recommended that the complaints against the Respondent Activity and the Respondent Union be dismissed.

H. STEPHAN GORDON
Chief Hearing Examiner

Dated at Washington, D. C.
this 25th day of April, 1972.

UNITED STATES DEPARTMENT OF LABOR August 24, 1972
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

ARMY AND AIR FORCE EXCHANGE SERVICE,
DIX-McGUIRE CONSOLIDATED EXCHANGE,
FORT DIX, NEW JERSEY
A/SLMR No. 195

This case involved a clarification of unit petition (CU) filed by the Activity, Army and Air Force Exchange Service, Dix-McGuire Consolidated Exchange, Fort Dix, New Jersey, which seeks to include 173 unrepresented employees at the former McGuire Air Force Base Exchange in the unit of 462 employees of the former Fort Dix Post Exchange who are currently exclusively represented by the American Federation of Government Employees, AFL-CIO, Local 1999 (AFGE). The AFGE contended that the CU petition was untimely as it was filed within one year of a certification of representative and, further, that the proceeding herein was blocked by a pending unfair labor practice complaint.

The Assistant Secretary rejected the AFGE's contentions stating that because an appropriately filed CU petition does not raise a question concerning representation, neither the certification year bar, nor the "blocking" principle of an unfair labor practice complaint, was applicable.

The Assistant Secretary further found that the employees at the former McGuire Air Force Base Exchange constituted an addition or accretion to the exclusively recognized unit represented by the AFGE. In this regard, he noted the fact that, with a limited exception, all employees at the recently established Dix-McGuire Consolidated Exchange are located physically on the Fort Dix military reservation; are subject to the same Activity-wide personnel policies, including promotion and reduction-in-force procedures, administered through a central personnel office; have similar skills and job classifications; perform the same work; have identical fringe benefit programs; have the same hours of work;and are under the overall supervision of the General Manager of the Consolidated Exchange. He also found that there has been employee interchange and transfer among those employees originally located at McGuire Air Force Base Exchange and those located at the Fort Dix Post Exchange represented by the AFGE; and the McGuire Air Force Base Exchange Headquarters has been phased out with its employees and its authority transferred to the Headquarters of the Dix-McGuire Consolidated Exchange. The Assistant Secretary noted that the evidence overall established that the employees at the McGuire Air Force Base Exchange had been administratively, and in many instances, physically integrated with the employees of the former Fort Dix Post Exchange covered by exclusive recognition. As a result, he ordered that the existing unit be clarified to include those employees formerly employed by the McGuire Air Force Base Exchange. In addition, he found that the change sought in the designation of the Activity was warranted and he, therefore, ordered that the name of the Activity described in the prior certification be changed to the Dix-McGuire Consolidated Exchange.

A/SLMR No. 195

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ARMY AND AIR FORCE EXCHANGE SERVICE,
DIX-McGUIRE CONSOLIDATED EXCHANGE,
FORT DIX, NEW JERSEY 1/

Activity-Petitioner

and

Case No. 32-2461

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1999

Labor Organization

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Charles L. 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 the Activity-Petitioner's brief, the Assistant Secretary finds:

The Activity-Petitioner (Dix-McGuire) filed a clarification of unit petition (CU) in the subject case seeking clarification of an existing exclusively recognized bargaining unit in order to have it conform to a new organizational structure brought about by the merger of the Fort Dix Post Exchange and the McGuire Air Force Base Exchange into the Dix-McGuire Consolidated Exchange. More specifically, Dix-McGuire seeks to add the 173 unrepresented employees of the former McGuire Air Force Base Exchange to the unit of 462 employees of the former Fort Dix Post Exchange who are currently exclusively represented by the American Federation of Government Employees, AFL-CIO, Local 1999, herein called AFGE. The proposed unit description includes: All regular full-time and regular part-time hourly paid civilian employees and all regular full-time and regular part-time military personnel employed during off-duty hours, employed by the Dix-McGuire Consolidated Exchange at Fort Dix, New Jersey; the Pedricktown Support Installation, Pedricktown, New Jersey; the Defense Supply Agency, Philadelphia, Pennsylvania; the McGuire Air Force Base, New Jersey; the Gibbsboro ADC, 772 Radar Squadron, Gibbsboro, New Jersey; and the Pomona ADC 95th Fighter Interceptor Squadron, Atlantic City, New Jersey. Excluded are temporary full-time employees and temporary part-time employees, casual employees, management officials, management trainees exercising supervisory authority, personnel employees employed in other than a purely clerical capacity, supervisors and guards as defined in Executive Order 11491, professional employees and employees of the Capital Exchange Region. 2/

The AFGE contends that Section 202.3(b) of the Assistant Secretary's Regulations 3/ bars the subject petition because it was filed less than 12 months after the AFGE was certified as representative of the employees in the Fort Dix Exchange unit. Further, it asserts that its filing of an unfair labor practice complaint in Case No. 32-2431 against Dix-McGuire should block further processing of the subject petition.

With respect to the AFGE's above-noted contentions, the twelve-month certification bar established under Section 202.3(b) of the Assistant Secretary's Regulations was designed to afford an agency or activity and a certified incumbent labor organization a reasonable period of time in which to initiate and develop their bargaining relationship free of rival claims. Further, the principle that an unfair labor practice complaint ordinarily "blocks" the processing of a representation petition in the unit in which the alleged unfair labor practice occurred was designed to assure that an election would not be conducted where existing alleged unfair labor practices in the unit involved in the election had not yet been resolved.

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

2/ The unit description appears as amended at the hearing. In its brief, Dix-McGuire further attempted to amend its petition to exclude "on-call" employees from the unit and to delete the designation "hourly paid" from the included portion of the unit description. As Dix-McGuire did not amend its petition in this regard either at the hearing or at any time prior thereto, the proposed amendments are hereby denied.

3/ Section 202.3(b) provides, in pertinent part, "When there is a recognized or certified exclusive representative of the employees, a petition will not be considered timely if filed within twelve (12) months after the grant of exclusive recognition or certification as the exclusive representative of employees in an appropriate unit..."

I have stated previously 4/that a CU petition is a vehicle by which parties may seek to illuminate and clarify, consistent with their intent, the unit inclusions or exclusions after the basic question of representation has been resolved. As an appropriately filed CU petition may not raise a question concerning representation, thereby precluding the possibility of raising a rival claim under such a petition, it is clear that the certification bar established under Section 202.3(b) of the Assistant Secretary's Regulations would not be applicable to a CU petition. Similarly, as an appropriately filed CU petition may not raise a question concerning representation which is to be resolved ultimately in an election, the "blocking" principle, noted above, would not be applicable to the processing of such a petition. Under these circumstances, I hereby reject the AFGE's above-noted contentions.

Fort Dix is an Army training post located on the Fort Dix military reservation near Bordentown, New Jersey. McGuire Air Force Base is located physically on land within the Fort Dix military reservation although it has been a separate organizational entity since the U. S. Air Force became a separate branch of the military service.

Prior to September 26, 1971, Fort Dix and McGuire Air Force Base had their own separate base exchanges. Thus, each had its own General Manager as well as its own administrative and operational staffs and accounting and maintenance personnel. Both, however, received certain personnel support and services from the Capital Exchange Region. At Fort Dix, there were 22 retail branches, 16 food branches and 4 service branches, and at McGuire Air Force Base, there were 5 retail branches, 5 food branches and 2 service branches. Each exchange had its own retention roster for reduction-in-force purposes and its own hiring and promotion plans and areas of consideration. There was no interchange or transfer of employees between the 2 exchanges. Additionally, both exchanges were subject to the same Army and Air Force Exchange Service regulations, and both essentially provided the same products and services and employed employees in similar job classifications.

On June 3, 1971, the AFGE was certified as the exclusive representative in a unit composed of "All regular full-time and regular part-time hourly paid civilian employees and all regular full-time and regular part-time Military personnel employed during off-duty hours employed by the Fort Dix Exchange at Fort Dix, New Jersey, the Pedricktown Support Installation, Pedricktown, New Jersey, and the Defense Supply Agency, Philadelphia, Pa."

On September 26, 1971, the Fort Dix Post Exchange and the McGuire Air Force Base Exchange were consolidated into one organizational entity, namely the Dix-McGuire Consolidated Exchange. In this connection,all employees of the Fort Dix Post Exchange and the McGuire Air Force Base Exchange were transferred administratively to the new entity.

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

The record reveals that there are approximately 27 retail branches, 21 food branches and 6 directly operated service branches employing approximately 645 employees at the Dix-McGuire Consolidated Exchange. All of these facilities, with the exception of 8 satellite activities employing a total of 18 individuals, are located physically at the Fort Dix military reservation.

As a result of the consolidation, the McGuire Air Force Base Exchange Headquarters was phased out and all of its administrative and operational staff were transferred either to new locations or to new jobs within Dix-McGuire Consolidated Exchange. With the exception of a few staff members from the defunct McGuire Air Force Base Exchange Headquarters, the record reveals that the Headquarters' staff of Dix-McGuire, located at Fort Dix, consists of the administrative and operational staff of the former Fort Dix Post Exchange Headquarters, including the latter's former General Manager, who continue to perform the same jobs as were performed prior to the consolidation.

The Dix-McGuire Consolidated Exchange is organized along the same lines as other exchange level facilities within the Army and Air Force Exchange Service. Under the General Manager is an Accounting Office, Personnel Office, a Maintenance Department and three Staff Operational Offices. The three basic operations are: retail, food, and services. Each operation is supervised by an Operation Manager and is comprised of a number of branches or activities under the Operation Manager. The retail function consists of the ordering, receipt, warehousing, stocking, selling and inventory of retail items in the retail facilities. The work is performed by warehousemen, stockhandlers, sales clerks, and cashiers-checkers. Food operation employees are engaged in the preparation and sale of food at various locations throughout the facility. Services operation facilities include gasoline stations which are operated directly or through the use of concessionaires. All employees at the Dix-McGuire Consolidated Exchange having the same job categories operate under the same standard job descriptions and perform similar work requiring similar skills and knowledge regardless of their physical location within the Exchange.

As a result of the consolidation, the Personnel Office under the authority of the Capital Exchange Region, which previously had performed separate functions for the Fort Dix and the McGuire Air Force Base Exchanges, was transferred to the Dix-McGuire Consolidated Exchange. Additionally, two new branches were established, staffed by former employees of both exchanges, for the purpose of servicing all Dix-McGuire Consolidated Exchange facilities. One branch was a single, central warehouse performing storage functions for all retail facilities within Dix-McGuire. The other was a central food preparation area servicing all of the Consolidated Exchange's food facilities. The record reveals that both of these facilities are located on former Fort Dix Post Exchange property.

As noted above, prior to the consolidation, there was no transfer or interchange between employees of the two exchanges. However, at the time of the consolidation, 7 Fort Dix Exchange employees were transferred to McGuire Air Force Base Exchange duty stations and 19 McGuire Air Force Base Exchange employees were transferred to Fort Dix Exchange duty stations. Further, when the central consolidated warehouse operation, which is located physically at Fort Dix, commenced operations, 5 McGuire Air Force Base Exchange employees were moved into the warehouse. The record reveals also that based on workload requirements, employees may be moved on two week notice from one branch within the Consolidated Exchange to another irrespective of their physical location on either Fort Dix or McGuire Air Force Base property. Such movement by employees only requires the approval of the General Manager.

The evidence establishes that all of Dix-McGuire Consolidated Exchange employees are under an identical wage schedule, and that fringe benefit programs, established in accordance with applicable regulations, are the same for all eligible employees. Further, all vacancies and promotional opportunities within the Dix-McGuire Consolidated Exchange are posted in all facilities of Fort Dix and McGuire Air Force Base so that any interested employee may apply and be considered. In the case of a reduction-in-force, the record reveals that all employees within the affected categories of the Dix-McGuire Consolidated Exchange would be placed upon the Activity-wide retention rosters. Moreover, the hours of work are the same for employees throughout the Consolidated Exchange and the authority for collective bargaining for all employees within the Consolidated Exchange is at the General Manager level.

Based on the foregoing circumstances, I find that the employees of the former McGuire Air Force Base Exchange constitute an addition or accretion to the exclusively recognized unit represented by the AFGE. Thus, as noted above, the employees of the recently established Dix-McGuire Consolidated Exchange, with a limited exception, are located physically on the Fort Dix military reservation; are subject to the same Activity-wide personnel policies, including promotion and reduction-in-force procedures, administered through a central personnel office; have similar skills and job classifications; perform the same work; have identical fringe benefit programs; have the same hours of work; and are under the overall supervision of the General Manager of the Consolidated Exchange. Moreover, the evidence establishes that there has been employee interchange and transfer among those originally located at McGuire Air Force Base Exchange and those located at Fort Dix Base Exchange represented by the AFGE. Further, it is clear that the McGuire Air Force Base Exchange Headquarters has been phased out with its employees and its authority transferred to the Headquarters of the Dix-McGuire Consolidated Exchange. Thus, the record overall reveals that the employees at the McGuire Air Force Base Exchange have been administratively and, in many instances, physically integrated with the employees of the Fort Dix Post Exchange covered by exclusive recognition. In these circumstances, I find that the existing unit should be clarified to include those employees formerly employed by the McGuire Air Force Base Exchange. 5/ I find also that the change sought in the designation of the Activity is warranted as it is clear that pursuant to the above-noted consolidation the Activity involved is now designated as the Dix-McGuire Consolidated Exchange.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, in which exclusive recognition was granted on June 3, 1971, to American Federation of Government Employees, AFL-CIO, Local 1999, located at the Fort Dix Exchange, Fort Dix, New Jersey, be, and hereby is, clarified by including in the said unit all regular full-time and regular part-time hourly paid civilian employees and all regular full-time and regular part-time military personnel employed during off-duty hours, formerly employed by the McGuire Air Force Base Exchange, McGuire Air Force Base, New Jersey, the Gibbsboro ADC, 772 Radar Squadron, Gibbsboro, New Jersey, and the Pomona ADC 95th Fighter Interceptor Squadron, Atlantic City, New Jersey.

IT IS FURTHER ORDERED that the designation of the Activity, Fort Dix Exchange, described in the prior certification, be changed to the Dix-McGuire Consolidated Exchange. 6/

Dated, Washington, D. C.
August 24, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

5/ Cf. United States Department of the Air Force, 434th S.O.W., Air Force Reserve, Grissom Air Force Base, Peru, Indiana, A/SLMR No. 149

6/ While, as noted in Headquarters, U. S. Army Aviation Systems Command, St. Louis, Missouri, cited above, a petition for amendment of certification (AC) is the appropriate vehicle to effectuate a change in the name of an agency or activity to reflect current circumstances, I find that it would be overly technical and improper in the circumstances of this case to dismiss this aspect of the instant CU petition on the basis that Dix-McGuire filed the wrong type of petition.

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

NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION,
COMMUNICATIONS OPERATING BRANCH
A/SLMR No. 196

The Petitioner, National Association of Government Employees, R3-60, Independent (NAGE), sought an election in a unit of all nonsupervisory employees of the Communications Operating Branch, Communications Division, Office of Meteorological Operations, National Weather Service. The Activity was in agreement with respect to the appropriateness of the claimed unit.

The National Weather Service, one of six line components of the National Oceanic and Atmospheric Administration, is composed of the Office of Meteorological Operations (OMO) and four other independent offices. The OMO, in turn, is composed of five divisions, one of which is the Communications Division. Under the Communications Division are five units, including the Communications Operating Branch, in which are located all the employees sought by the NAGE. All except three of the employees in the claimed unit are in job classifications which include Teletypists and Communications Control Technicians and Communications Operators (facsimile operators). The Communications Operating Branch operates a system-wide teletype communications circuit and a system-wide facsimile communications circuit.

The Assistant Secretary found the claimed unit to be inappropriate for the purpose of exclusive recognition. In this connection, he noted that the employees sought do not constitute a grouping of craft employees; they share with other employees of the Communications Division, the OMO, and the National Weather Service, the same overall supervision; they are subject to the same personnel policies and procedures as other Division, OMO and National Weather Service employees; all employees of the Division and OMO headquarters are located in the Washington, D.C. metropolitan area; and they work in conjunction with employees of other independent offices of the National Weather Service with whom they share a common mission. In these circumstances, the Assistant Secretary concluded that the employees in the petitioned for unit do not share a clear and identifiable community of interest and that the proposed unit would not promote effective dealings and efficiency of agency operations.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION,
COMMUNICATIONS OPERATING
BRANCH

Activity

and

Case No. 22-3387(RO)

NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES, R3-60, INDEPENDENT

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 Michael B. Cahir. 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 a brief filed by the NAGE, the Assistant Secretary finds:

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

1/ The Hearing Officer referred to the Assistant Secretary a motion by the Activity and the Petitioner, National Association of Government Employees, R3-60, Independent, herein called NAGE, that the consent election agreement which the parties had entered into in this matter be approved and that the current proceeding be dismissed. For the reasons set forth in Army and Air Force Exchange Service, White Sands Missile Range Exchange, White Sands Missile Range, New Mexico, A/SLMR No. 25, I reject the parties' contention that a hearing not be conducted in this matter solely because the parties assert they are in agreement on the appropriateness of the claimed unit. Accordingly, the motion is denied.

2. The NAGE seeks an election in a unit of all nonsupervisory employees of the Communications Operating Branch, Communications Division, Office of Meteorological Operations, National Weather Service, excluding supervisors, managers, guards, professionals, and employees engaged in personnel work of other than a purely clerical nature. The Activity is in agreement with respect to the appropriateness of the claimed unit.

The National Weather Service, one of six line components of the National Oceanic and Atmospheric Administration (NOAA), is responsible for meteorological and hydrologic service programs of the Federal government. Each of the six components of NOAA has a separate director, separate funding allocated by the Department of Commerce through the NOAA Director, and a separate budget for staffing purposes. The National Weather Service is composed of the Office of Meteorological Operations (OMO) and four other offices. The mission of the OMO is to establish policies and procedures for the observation, preparation and distribution of weather forecasts, weather conditions and warnings throughout the National Weather Service. The Associate Director of OMO, along with the Associate Directors of the other offices of the National Weather Service, reports directly to the Director of the National Weather Service.

The OMO, in turn, is composed of five divisions, one of which is the Communications Division, which is responsible for the total communications function of the National Weather Service. Under the Communications Division are five units, one of which, the Communications Operating Branch, includes all of the petitioned for employees. The primary function of the Communications Operating Branch is the sending of information submitted by the National Meteorological Center - one of the offices of the National Weather Service - to both intracontinental and inter-continental receiving stations. There are approximately 75-80 employees in the Communications Division of whom some 40-45 are in the Communications Operating Branch. The record reveals that the employees in the Communications Operating Branch operate a system-wide teletype communications circuit and a system-wide facsimile communications circuit. In this connection, all but three of the employees in the Branch are in two Civil Service job series, GS-392 and GS-385. 2/ The record reflects that the skills needed to perform the job functions in the Communications Operating Branch are largely clerical in nature.

The evidence establishes that the employees of the Communications Division and of the other divisions of the OMO are located in the metropolitan Washington, D.C. area. In this connection, the headquarters of the five divisions of the OMO, including the Communications Division, is located in Silver Spring, Maryland, and all the units of the

2/ The GS-385 series includes Teletypists and the GS-392 series includes Communications Control Technicians and Communications Operators (facsimile). There are no other employees within the Communications Division in these job series.

Communications Division, with the exception of the Communications Operating Branch, which is located in Suitland, Maryland, are also housed in Silver Spring.

As indicated above, most of the communications work performed by the Communications Operating Branch is done in conjunction with the National Meteorological Center, one of the offices of the National Weather Service, which is also located in Suitland, Maryland.

Each of the five units of the Communications Division, including the Communications Operating Branch, is headed by a Branch Chief who reports to the Chief of the Division who, in turn, is responsible to the Associate Director of the OMO. The record reflects that while the Branch Chief of the Communications Operating Branch may recommend hiring, firing, promotions, disciplinary action, and leave issuance, final authority with respect to these actions rests with either the Chief of the Communications Division or the Associate Director of the OMO, depending on the type of action involved.

Under all the circumstances, I find the claimed unit to be inappropriate for the purpose of exclusive recognition under the Order. Thus, the employees sought do not constitute a grouping of craft employees; they share with other employees of the Communications Division, the OMO, and the National Weather Service, the same overall supervision; they are subject to the same personnel policies and procedures as other Division, OMO and National Weather Service employees; all employees of the Division and of OMO headquarters are located within the metropolitan Washington, D.C. area; and they work in conjunction with employees from other independent offices of the National Weather Service, such as the National Meteorological Center, with whom they share a common mission. In these circumstances, I find that the employees in the petitioned for unit do not share a clear and identifiable community of interest and that the proposed unit would not promote effective dealings and efficiency of agency operations.

Accordingly, I shall dismiss the NAGE's petition.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 22-3387(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
August 31, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

August 31, 1972

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

DEPARTMENT OF JUSTICE,
UNITED STATES MARSHAL'S SERVICE,
NORTHERN DISTRICT OF ILLINOIS
A/SLMR No. 197

This case arose as the result of a petition filed by Local 3259, American Federation of Government Employees, AFL-CIO, seeking an election among all nonsupervisory Deputy U.S. Marshals employed in the Northern District of Illinois. The Activity took the position that the unit sought was inappropriate, arguing that the only appropriate unit herein would be one that included all Deputy U.S. Marshals in the U.S. Marshal's Service, nationwide.

The Assistant Secretary found, in agreement with the parties, that Deputy U.S. Marshals are not "guards" within the meaning of Section 2(d) of the Executive Order. In this regard he noted the parties' contention that although certain aspects of the mission and duties of the Deputy U.S. Marshals bear some relationship to the definition of "guards" as set forth in the Order, these employees are further charged with additional missions and more varied duties of a law enforcement nature which would distinguish them from "guards." The Assistant Secretary noted also that as law enforcement officers, Deputy U.S. Marshals were responsible for law enforcement activities against the public-at-large, which only incidentally includes other Federal employees and, as such, there was no inherent conflict between their duties to their employer and any possible loyalty to fellow union members. Under these circumstances, the Assistant Secretary concluded that Deputy U.S. Marshals could be included together with non-guard employees in appropriate bargaining units and could be represented by organizations which admit to membership, or are affiliated directly or indirectly with organizations which admit to membership, employees other than guards.

The Assistant Secretary further found that there is a clear and identifiable community of interest among all nonsupervisory Deputy U.S. Marshals employed in the Northern District of Illinois. In reaching this conclusion, the Assistant Secretary noted that all Deputy U.S. Marshals in the District share a common mission; have interchangeable job functions; are subject to a common, local supervision; are effectively evaluated according to uniform standards by the same managerial authority; and enjoy common personnel and labor relations policies which, although subject to broad policy guidelines established by the National Office, are executed by the U.S. Marshal in the District.

The Assistant Secretary further found that Deputy U.S. Marshals currently designated as "Term" share a clear and identifiable community of interest with the career and career-conditional Deputy U.S. Marshals and, therefore, should be included in the unit found appropriate. In this regard, he noted that Term Deputy U.S. Marshals share with the career and career-conditional Deputy Marshals a common mission, pay scale, job assignments, working conditions and uniform personnel and labor relations policies.

Additionally, the Assistant Secretary found that clerical and/or administrative employees should also be included in the unit found appropriate. In this connection, he noted that they share a common mission and have common supervision; their duties are interrelated and require a high degree of cooperation and coordination with the Deputy U.S. Marshals to achieve the common mission; and they enjoy common personnel and labor relations policies. Further, he noted that clerical employees, who are sworn in as Deputy U.S. Marshals upon being hired, from time to time act as matrons for female prisoners and, while so serving, engage in similar duties and responsibilities, often working side-by-side with the Deputy U.S. Marshals.

Accordingly, the Assistant Secretary ordered an election among all the employees of the Activity, including Term Deputy U.S. Marshals and clerical employees.

A/SLMR No. 197

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF JUSTICE,
UNITED STATES MARSHAL'S SERVICE,
NORTHERN DISTRICT OF ILLINOIS 1/

Activity

and

Case No. 50-5552 (25)

LOCAL 3259, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO 2/

Petitioner

DECISION AND DIRECTION OF ELECTION

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

Upon the entire record in this case, including 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, Local 3259, American Federation of Government Employees, AFL-CIO, herein called AFGE, seeks an election in a unit of all career and career-conditional Deputy U.S. Marshals of the United States Marshal's Service, Northern District of Illinois, excluding all Term Deputy U.S. Marshals, excepted Intermittent Deputy U.S. Marshals, clerical employees, management officials, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors and guards as defined in the Executive Order. 3/

The Activity and the AFGE agree that Deputy U.S. Marshals are not "guards" within the meaning of the Executive Order. 4/ However, the Activity contends that the district-wide unit sought is inappropriate, and that only a nationwide unit of all career and career-conditional Deputy U.S. Marshals in the U.S. Marshal's Service, excluding all Term Deputy U.S. Marshals, Intermittent Deputy U.S. Marshals and clerical employees would be appropriate. 5/

Under Section 10(b)(3) of the Order, guards may not be included together with other employees in exclusive bargaining units established under Executive Order 11491. Further, Section 10(c) of the Order provides that "An agency shall not accord exclusive recognition to a labor organization as the representative of employees in a unit of guards if the organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards." Thus, it is clear that if Deputy U.S. Marshals in the claimed unit are "guards" within the meaning of Section 2(d) of the Order, any unit of Deputy U.S. Marshals could not include employees in non-guard classifications. Nor could the petitioning AFGE local herein be accorded exclusive recognition in the unit sought as it is clear that such local is directly affiliated with an organization which admits to membership employees other than guards.

The record discloses that the primary mission of the U.S. Marshal's Service is to serve as the "executive-arm" of the Federal judiciary and, as such, a Deputy U.S. Marshal normally is in attendance at all times when court is in session. 6/ While in court attendance, the duties of

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 unit description appears as amended at the hearing.

4/ A "Guard" is defined in Section 2(d) of the Order as: "--an employee assigned to enforce against employees and other persons rules to protect agency property or the safety of persons on agency premises, or to maintain law and order in areas or facilities under Government control;"

5/ It should be noted that in Department of Justice, U.S. Marshal's Service, Northern District of Georgia, A/SLMR No. 198, the Activity took a contrary position on the appropriateness of the claimed unit in that case, contending that a district-wide unit of Deputy U.S. Marshals was appropriate and would promote effective dealings and efficiency of agency operations.

6/ The record herein is not clear as to the practice in all Districts; however, with regard to the District involved in the subject case, the record is clear that a Deputy is required to be in attendance at all times when the court is in session.

the Deputy U.S. Marshal are essentially that of a court bailiff; that is, he is charged with maintaining order within the courtroom. In addition, the Deputy U.S. Marshal has responsibility for the well-being of the jury, the calling of witnesses, and has the care and custody of prisoners brought before the court.

The Activity and the AFGE contend that although certain aspects of the mission and duties of the Deputy U.S. Marshals bear some relationship to the definition of "guards" set forth in Section 2(d) of the Order, these employees are further charged with additional missions and more varied duties of a law enforcement nature which would distinguish them from "guards" as defined in the Order. Thus, it is asserted and the record reveals that Deputy U.S. Marshals have broad arrest powers; they act in cooperation with other law enforcement agencies, such as the Federal Bureau of Investigation, the Department of the Treasury, the Bureau of Narcotics, etc.; they are charged with certain responsibilities in connection with the anti-air piracy program coordinated by the Federal Aviation Administration; they are charged with responsibilities in connection with civil disturbances; and they serve all warrants, subpoenas and all other civil and criminal processes issued by the court. Based on these duties and responsibilities, the Activity and the AFGE assert that Deputy Marshals are, in fact, law enforcement officers, rather than "guards." Moreover, it is noted by the parties that the foregoing distinction is recognized by the Civil Service Commission, which classifies Deputy U.S. Marshals in the GS-083 Police series, a series which includes job classifications having law enforcement responsibilities, rather than the Guard series, GS-085.

The Study Committee in its August 1969 Report and Recommendations on Labor-Management Relations in the Federal Service, which is part of the "legislative history" of the Executive Order, indicated that the same considerations applicable in the private sector with respect to guards should be applied in the Federal service. 7/ In this regard, it is clear that in the private sector the rationale for separating guards from other employees for labor relations purposes is based on the view that a mixture of guards and non-guards in employee bargaining units, and guard representation by labor organizations which admit to membership employees other than guards, would result in an inherent conflict of interest between the guards' loyalty to fellow union members and their duty to their employers. In my view, the record herein reflects that, on balance, the duties and responsibilities of the Deputy U.S. Marshals would not create such an inherent conflict of interest between the Deputy U.S. Marshals and other Federal employees covered by the Executive Order. Thus, the general mission of the Deputy U.S. Marshals is to enforce laws against the public-at-large, which only incidentally includes other Federal employees. In these circumstances, and noting also the aforementioned contentions of the Department of Justice and the AFGE, I find that Deputy U.S. Marshals are not

7/ See Section B(6) of the Report and Recommendations. See also Veterans Administration Hospital, Brockton, Massachusetts, A/SLMR No. 21

"guards" within the meaning of Section 2(d) of the Executive Order. Consequently, they may be included together with non-guard employees in appropriate bargaining units and may be represented on an exclusive basis by an organization which admits to membership employees other than guards, or which is affiliated directly or indirectly with an organization which admits to membership employees other than guards.

Appropriate Unit

The record discloses that the U.S. Marshal's Service is organized under the Justice Department and, as such, is responsible to the Attorney-General and the Deputy Attorney-General of the United States. The Service is headed by a Commissioner and three Assistant Commissioners with the latter being in charge of the three main Divisions in which the Service is organized: Operations, Administration, and Internal Affairs. Under the office of the Commissioner are the various U.S. Marshals, who are appointed by the President for each of the more than 90 Judicial Districts. Each of the Districts is organized basically in a similar fashion, with the U.S. Marshal having overall responsibility. Under the Marshal is a Chief Deputy U.S. Marshal and Supervisory Deputy U.S. Marshals, the number of whom vary according to the size of the individual District office.

The Northern District of Illinois has its headquarters in the Federal Courthouse in Chicago, Illinois. In addition to the U.S. Marshal, this office is staffed with a Chief Deputy U.S. Marshal, 4 Supervisory Deputy U.S. Marshals, 22 career and career-conditional Deputy U.S. Marshals, 11 Term Deputy U.S. Marshals, 1 Intermittent (WAE) Deputy U.S. Marshal, 2 Veterans Readjustment Appointee Deputy U.S. Marshals, and 8 clerical employees.

Essentially, the day-to-day duties of the Deputy U.S. Marshals involve, in addition to the courtroom duties noted above, the custody and transportation of prisoners, the serving of warrants, writs and other civil and criminal processes of the court, and the various duties and responsibilities associated with the anti-air piracy program. These various duties are shared, on a more or less rotational basis, by all the Deputy U.S. Marshals in the District. In addition, from time to time, Deputy U.S. Marshals may be assigned duties in cooperation with law enforcement agencies such as the Federal Bureau of Investigation, the Department of the Treasury and the Bureau of Narcotics, as well as duties in connection with the Special Operations Group of the U.S. Marshal's Service. 8/

Career and career-conditional Deputy U.S. Marshals are hired by the Marshal pursuant to standards and qualifications established by the Civil Service Commission. They normally are hired at grade GS-6 except for Veteran Readjustment Appointees who may be hired at the GS-4 or 5 level.

8/ This latter group is composed of selected volunteers from among the career and career-conditional Deputy U.S. Marshals throughout the country, and its mission is the quelling of civil disturbances.

After their hire, Deputy U.S. Marshals are required to attend certain formal training sessions specified and administered by the National Office. In addition, they may be appointed by the U.S. Marshal for non-service training given by sister agencies, such as the Federal Bureau of Investigation and the Department of the Treasury, with the approval of the National Office. Also, with the approval of the U.S. Marshal, they may apply for appointment to the Special Operations Group and undergo further training pursuant to that aspect of their duties. Additional training is received in the District on an on-the-job basis.

The record reveals that, although personnel records are kept in the National Office, copies of such records also are maintained in the individual District Offices, and that the U.S. Marshal in charge of each office is responsible for the carrying out of personnel functions for the District employees within certain broad policy guidelines issued by the National Office. All promotions of Deputy U.S. Marshals up to, and including, GS-8 are non-competitive and are based upon the recommendations of the particular U.S. Marshal involved. Promotions to positions rated GS-9 and above, which generally involve supervisory positions, are competitive and the area for consideration for promotion to such positions is nationwide, pursuant to a Merit Promotion System instituted and administered by the National Office. Each U.S. Marshal is responsible for all disciplinary actions involving the Deputy U.S. Marshals in his District, subject to National Office approval. In this regard, the record discloses that any action taken by the U.S. Marshal generally is approved by the National Office without further investigation. Any grievances filed by a Deputy U.S. Marshal are handled by the Marshal, with final disposition by the National Office. Again, however, the record discloses that the U.S. Marshal's recommended disposition of the grievance normally is effective. The evidence establishes also that the U.S. Marshal is responsible for the assignment of individual Deputy Marshals to certain duties; can set hours of duty and approve overtime pay within certain broad policy guidelines established by the National Office; and can direct the use of private vehicles or government-owned vehicles to be utilized by the Deputy U.S. Marshals in the execution of their duties. The evidence establishes further that while each Deputy U.S. Marshal is hired with the understanding that he is subject to transfer to any District in the country, as a practical matter it appears that most transfers result from a promotion to a position rated GS-9 or above which, as noted above, is generally a supervisory position. 9/

Based on the foregoing circumstances, I find that there is a clear and identifiable community of interest among the nonsupervisory Deputy U.S. Marshals employed in the Northern District of Illinois. Thus, all such employees in the District share in a common mission; have interchangeable job functions; are subject to common supervision at the District level;

9/ However, it appears that any Deputy Marshal may, at his discretion, request a transfer to another District. The record reveals that such a transfer is at the convenience of the individual and is at the expense of the requesting individual.

are effectively evaluated at the District level; and enjoy common personnel and labor relations policies which, although subject to broad policy guidelines established by the National Office, are executed by the U.S. Marshal in the District. Under these circumstances, I find that the claimed unit is appropriate for the purpose of exclusive recognition and that such a unit will promote effective dealings and efficiency of agency operations. Accordingly, I shall order that an election be conducted among the Deputy U.S. Marshals in the Northern District of Illinois.

Eligibility Issues

The record discloses also that there are eligibility issues with respect to certain employee classifications or groups of employees in the unit found appropriate.

Term Deputy U.S. Marshals

The District utilizes a classification of Deputy U.S. Marshal known as "Term Deputy." This classification was initiated recently as a consequence of the involvement of the U.S. Marshal's Service in the anti-air piracy program. Term Deputy U.S. Marshals are appointed for a term of from one to four years, and may be reappointed upon the completion of their term. The AFGE sought to exclude Term Deputy Marshals from its claimed unit, and the Activity agreed, contending that the limited nature of their appointment precludes the Term Deputies from sharing in the same community of interest as that of the career and career-conditional Deputy U.S. Marshals.

Term Deputy Marshals are appointed pursuant to standards and qualifications established by the Civil Service Commission and, once hired, they are subject to the same formal and informal training accorded career and career-conditional Deputy U.S. Marshals. They work under the same supervision as do the career and career-conditional Deputy U.S. Marshals, and are evaluated by the same supervisory personnel, according to the same standards of performance required in similar grades. Further, although the classification was instituted as a consequence of the anti-air piracy program, the record reveals that as a matter of practice, the Term Deputy Marshals are not limited in their duties to that particular program. Rather, they are rotated among certain of the various duties and responsibilities of the career and career-conditional Deputy U.S. Marshals, performing interchangeably, and sometimes side-by-side, with the career and career-conditional Deputy U.S. Marshals. The evidence reveals also that Term Deputy Marshals enjoy the same fringe benefits accorded the career and career-conditional employees with the exception of Civil Service retirement benefits.

Based on the foregoing, I find that Term Deputy U.S. Marshals, currently employed by the Activity, share a clear and identifiable community of interest with the career and career-conditional Deputy U.S.

Marshals. Thus, the record discloses that the Term Deputy Marshals share with career and career-conditional Deputy U.S. Marshals, a common mission, supervision, pay scale, job assignments, working conditions, and uniform personnel and labor relations policies. Accordingly, as to those Term Deputy U.S. Marshals deemed eligible to vote under the Direction of Election set forth below, I find that they should be included in the unit found appropriate. 10/

Clerical Employees

The record discloses that the Northern District of Illinois employs approximately eight clerical and/or administrative employees. The AFGE sought their exclusion from its claimed unit. The Activity agreed with the AFGE's position in this regard.

The record reveals that these employees are hired pursuant to Civil Service qualifications and standards applicable to the clerical and/or administrative classifications series, as opposed to qualifications and standards applicable to the law enforcement classification series. However, the evidence discloses that upon being hired, clerical employees are sworn in as Deputy U.S. Marshals, and from time to time serve as matrons for female prisoners. While clerical employees receive no special training to prepare them for the performance of certain duties of Deputy U.S. Marshals and normally they do not engage in such duties, there is no legal restriction upon the type of Marshal's duties which they may be called upon to perform. Generally, the day-to-day duties of these employees involve a wide range of clerical and administrative functions including accounting for the receipt and disbursement of funds involved in the operations of the court. The record reveals that these employees work in the District Headquarters Office, are supervised by the Chief Deputy U.S. Marshal, receive the usual benefits normally associated with Federal employment, and have not been subject to either temporary or permanent transfers. Their area for consideration for either promotion or reduction-in-force is within the District and within their respective classifications.

10/ Although the periods for which the Term Deputy Marshals may be appointed may vary from one to four years, the employees in this classification are appointed for terms not to exceed beyond June 30, 1972. At the time of the hearing herein, the Activity was unable to speculate with any degree of certainty as to whether Term Deputy U.S. Marshals would be employed beyond that date, or whether they would be terminated as of that date. Based on the circumstances described above, I find that if the employment of these employees has been extended beyond June 30, 1972, they would be included in the claimed unit.

Based on the foregoing, I find that the clerical and/or administrative employees employed by the Activity share a clear and identifiable community of interest with the Deputy U.S. Marshals. Thus, they share with the Deputy U.S. Marshals common mission and common supervision; their duties and responsibilities are interrelated with those of the Marshals and require a high degree of cooperation and interrelationship to achieve the common mission; and they enjoy common personnel and labor relations policies. Moreover, on those occasions when clericals are assigned to perform Deputy U.S. Marshal functions, they engage in similar duties and responsibilities, often working side-by-side with the Deputy U.S. Marshals. In these circumstances, I find that the clerical and/or administrative employees of the Activity should be included in the unit found appropriate.11/

Based on the foregoing, I find the following employees of the Activity constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491:

> All employees of the U.S. Marshal's Service, Northern District of Illinois, including Term Deputy U.S. Marshals and clerical employees, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who are 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

11/ The record further reveals that the Activity employs a classification of Deputy U.S. Marshal designated as "Intermittent" (WAE). The record reveals that these employees are hired outside the Civil Service Commission standards and requirements, and are employed on an "as needed" basis. They do not receive any training other than on-the-job; do not share in any fringe benefits enjoyed by the other Deputy U.S. Marshals; and are paid only when actually employed. On the other hand, such employees share a common mission with employees in the claimed unit and have common duties and supervision. As there is no evidence with respect to the frequency of their employment, nor any evidence as to the expectancy of future employment, I find that there is insufficient basis upon which I can make a finding as to their eligibility for inclusion within the appropriate unit.

furlough, including those in military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by Local 3259, American Federation of Government Employees, AFL-CIO.

Dated, Washington, D. C.
August 31, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

August 31, 1972

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

DEPARTMENT OF JUSTICE,
UNITED STATES MARSHAL'S SERVICE,
NORTHERN DISTRICT OF GEORGIA
A/SLMR No. 198

This case arose as the result of a petition filed by American Federation of Government Employees, Local 3319, AFL-CIO, seeking an election among all nonsupervisory Deputy U.S. Marshals employed in the Northern District of Georgia. The Activity took the position that the unit sought was appropriate and that it would promote effective dealings and efficiency of operations.

The Assistant Secretary found, in agreement with the parties, that Deputy U.S. Marshals are not "guards" within the meaning of Section 2(d) of the Executive Order. In this regard, the Assistant Secretary noted the contention of the parties that although certain aspects of the mission and duties of the Deputy U.S. Marshals bear some relationship to the definition of "guards" set forth in Section 2(d) of Order, they are further charged with additional missions and more varied duties of a law enforcement nature, in which they are engaged a majority of time, which would distinguish them from "guards." For the reasons enunciated in Department of Justice, U.S. Marshal's Service, Northern District of Illinois, A/SLMR No. 197, the Assistant Secretary found Deputy U.S. Marshals were not "guards" within the meaning of Section 2(d) of the Order.

The Assistant Secretary further found that there is a clear and identifiable community of interest among all nonsupervisory Deputy U.S. Marshals employed in the Northern District of Georgia. In reaching this conclusion, the Assistant Secretary noted that all Deputy U.S. Marshals in the District share a common mission; have interchangeable job functions; are subject to a common, local supervision; are effectively evaluated at the District level; and enjoy common personnel and labor relations policies which, although subject to policy guidelines established by the National Office, are executed by the U.S. Marshal in the District.

The Assistant Secretary found further that for the reasons enunciated in Department of Justice, United States Marshals Service, Northern District of Illinois, cited above, "Term" Deputy U.S. Marshals currently employed, share a clear and identifiable community of interest with the career and career-conditional Deputy U.S. Marshals and should

be included in the unit found appropriate, as should certain clerical and/or administrative personnel.

Accordingly, the Assistant Secretary ordered an election among all the employees of the Activity, including Term Deputy U.S. Marshals and clerical employees.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF JUSTICE,
UNITED STATES MARSHAL'S SERVICE,
NORTHERN DISTRICT OF GEORGIA 1/

Activity

and

Case No. 40-3429 (RO 25)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3319, AFL-CIO 2/

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, 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 a brief filed by the Petitioner, American Federation of Government Employees, Local 3319, AFL-CIO, herein called AFGE, the Assistant Secretary finds:

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

2. The AFGE seeks an election in a unit of all Deputy U. S. Marshals of the United States Marshal's Service, Northern District of Georgia, excluding all excepted Intermittent Deputy U. S. Marshals, all management officials, professional employees, clerks, typists, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors and guards as defined in the Executive Order. 3/

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 unit description appears as amended at the hearing.

The Activity takes the position that the unit sought is appropriate, 4/ but that it should exclude also employees classified as Term Deputy U.S. Marshals. Both the Activity and the AFGE agree that Deputy U.S. Marshals are not "guards" within the meaning of the Executive Order.5/

Under Section 10(b)(3) of the Order, guards may not be included together with other employees in exclusive bargaining units established under Executive Order 11491. Further, Section 10(c) of the Order provides that "An agency shall not accord exclusive recognition to a labor organization as the representative of employees in a unit of guards if the organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards." Thus, it is clear that if Deputy U.S. Marshals in the claimed unit are "guards" within the meaning of Section 2(d) of the Order, any unit of Deputy U.S. Marshals could not include employees in non-guard classifications. Nor could the petitioning AFGE local herein be accorded exclusive recognition in the unit sought as it is clear that such local is directly affiliated with an organization which admits to membership employees other than guards.

The record in this case discloses that the primary mission of the U.S. Marshal's Service is to serve as the "executive-arm" of the Federal judiciary and, as such, a Deputy U.S. Marshal is normally in attendance at all times when court is in session. 6/ While in attendance, the duties of the Deputy Marshal are essentially that of a court bailiff; that is, he is charged with maintaining order within the courtroom. In addition, the Deputy Marshal has responsibility for the well-being of the jury, the calling of witnesses, and has the care and custody of prisoners brought before the court.

The Activity and the AFGE contend, consistent with the arguments made in Department of Justice, U.S. Marshal's Service, Northern District of Illinois, cited above, that although certain aspects of the mission and duties of the Deputy U.S. Marshals bear some relationship to the definition of "guards" set forth in Section 2(d) of the Order, these employees are further charged with additional missions and more varied duties of a law enforcement nature, in which they are engaged a majority of the time, which would distinguish them from "guards" as defined by the Order. Based upon such additional missions and duties, the Activity and the AFGE assert that Deputy U.S. Marshals are, in fact, law-enforcement officers, rather than "guards."

For the reasons enunciated in Department of Justice, U.S. Marshal's Service, Northern District of Illinois, cited above, I find that Deputy U. S. Marshals are not "guards" within the meaning of Section 2(d) of the Executive Order. Consequently, they may be included together with non-guard employees in appropriate bargaining units and may be represented on an exclusive basis by an organization which admits to membership employees other than guards, or which is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

Appropriate Unit

The record discloses that the U.S. Marshal's Service is organized under the Justice Department and, as such, is responsible to the Attorney-General and the Deputy Attorney-General of the United States. The Service is headed by a Commissioner and three Assistant Commissioners with the latter being in charge of the three main Divisions in which the Service is organized: Operations, Administration, and Internal Affairs. Under the office of the Commissioner are the various U.S. Marshals, who are appointed by the President for each of the more than 90 Judicial Districts. Each of the Districts is basically organized in a similar fashion, with the U.S. Marshal having overall responsibility. Under the Marshal is a Chief Deputy U.S. Marshal and Supervisory Deputy U.S. Marshals, the number of whom will vary according to the size of the individual District office.

4/ In a related case, Department of Justice, U.S. Marshal's Service, Northern District of Illinois, A/SLMR No. 197, issued this date, the Activity took a contrary position on the appropriateness of the unit, contending that only a nationwide unit of all nonsupervisory career and career-conditional Deputy U.S. Marshals would be appropriate.

5/ A "Guard" is defined in Section 2(d) of the Order as:"--an employee assigned to enforce against employees and other persons rules to protect agency property or the safety of persons on agency premises, or to maintain law and order in areas or facilities under Government control;"

6/ The record herein is not clear as to the practice in all Districts; however, with regard to the District involved in the subject case, the record is clear that a Deputy is required to be in attendance at all times when the court is in session.

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The Northern District of Georgia encompasses 46 counties of the State of Georgia, and consists of approximately 14,000 square miles. The Headquarters of the Marshal's Service for the Northern District of Georgia is located in the Federal Courthouse in Atlanta, Georgia. In addition to Atlanta, the District Court sits on a rotating basis in Gainsville, Rome, and Newman, Georgia, and when the court is in session in those cities, a Deputy U.S. Marshal is sent to act as bailiff. The office of the U.S. Marshal in the Northern District of Georgia is staffed with a Chief Deputy U.S. Marshal,a Supervisory Deputy U.S. Marshal, 15 career or career-conditional Deputy U.S. Marshals, 9 Term Deputy U.S. Marshals, 3 Intermittent (WAE) Deputy U.S. Marshals and 5 clerical employees.

Essentially, the day-to-day duties of the Deputy Marshals involve, in addition to the court-room duties noted above, the custody and transportation of prisoners, the serving of warrants, writs and other civil and criminal processes of the court, and the duties and responsibilities associated with the anti-air piracy program. These various duties are shared, on a more or less rotational basis, by all the Deputy U.S. Marshals in the District. In addition, from time to time, Deputy U.S. Marshals may be assigned duties in cooperation with law enforcement agencies such as the Federal Bureau of Investigation, the Department of the Tresury, and the Bureau of Narcotics, as well as duties in connection with the Special Operations Group of the U.S. Marshal's Service. 7/

Career and career-conditional Deputy U.S. Marshals are hired by the Marshal pursuant to standards and qualifications established by the Civil Service Commission. They normally are hired in grade GS-6, but under certain circumstances may be hired in grade GS-4 or GS-5. After their hire, Deputy U.S. Marshals are required to attend certain formal training sessions specified and administered by the National Office. In addition, they may be appointed by the Marshal for non-service training given by sister agencies, such as the Federal Bureau of Investigation and the Department of the Treaury, with the approval of the National Office. Also, with the approval of the Marshal, they may apply for appointment to the Special Operations Group and undergo further training pursuant to that aspect of his duties. Additional training is supplied in the District on an on-the-job basis.

7/ This latter group is composed of selected volunteers from among the career and career-conditional Deputy U.S. Marshals throughout the country, and its mission is the quelling of civil disturbances.

The record reveals that, although personnel records are kept in the National Office, copies of such records are maintained in the individual District Offices, and that the U.S. Marshal in charge of each office is responsible for the carrying out of personnel functions for the District employees within certain broad policy guidelines issued by the National Office. All promotions of Deputy U.S. Marshals up to, and including, GS-8 are non-competitive and are based upon the recommendations of the particular U.S. Marshal involved. Promotions to positions rated GS-9 and above, which generally involve supervisory positions, are competitive, and the area for consideration for promotion to such positions is nationwide, pursuant to a Merit Promotion System instituted and administered by the National Office. Each U.S. Marshal is responsible for all disciplinary actions involving the Deputy U.S. Marshals in his District subject to National Office approval. In this regard, the record discloses that any action taken by the U.S. Marshal generally is approved by the National Office without further investigation. Any grievances filed by a Deputy U.S. Marshal are handled by the Marshal, with final disposition by the National Office. Again, however, the record discloses that the U.S. Marshal's recommended disposition of the grievance normally is effective. The U.S. Marshal is responsible for assignments of individual Deputy Marshals to certain duties; can set hours of duty and approve overtime pay within certain broad policy guidelines established by the National Office; and can direct the use of private vehicles or government-owned vehicles to be utilized by the Deputy U.S. Marshals in the execution of their duties. The record further reveals that while each Deputy U.S. Marshal is hired with the understanding that he is subject to transfer to any District in the country, as a practical matter it appears that most transfers involve a promotion to a position rated GS-9 or above which, as noted above, is generally a supervisory position. 8/

Based on the foregoing circumstances, I find that there is a clear and identifiable community of interest among all the nonsupervisory Deputy U.S. Marshals employed in the Northern District of Georgia. 9/ Thus, all such employees share a common mission; have interchangeable job functions; are subject to a common supervision at the District level; are effectively evaluated at the District level; and enjoy a common personnel and labor relations policies which, although subject to broad policy guidelines established by the National Office, are

8/ However, it appears that any Deputy U.S. Marshal may, at his discretion, request a transfer to another District. The record reveals that such a transfer is at the convenience of the individual and is at the expense of the requesting individual.

9/ Accord, Department of Justice, United States Marshal's Service, Northern District of Illinois, cited above.

executed by the U.S. Marshal in the District. Under these circumstances I find, consistent with the Activity's contention, that the claimed unit, is appropriate for the purpose of exclusive recognition and that such a unit will promote effective dealings and efficiency of agency operations. Accordingly, I shall order that an election be conducted among the Deputy U.S. Marshals in the Northern District of Georgia.

Eligibility Issues

The record discloses also that there are eligibility issues with respect to certain employee classifications or groups in the unit found appropriate.

Term Deputy U.S. Marshals

The record reveals that the District utilizes a classification of Deputy U.S. Marshal known as "Term Deputy." This classification was initiated recently as a consequence of the involvement of the U.S. Marshal's Service in the anti-air piracy program. Term Deputy U.S. Marshals are appointed for a term of from one to four years, and may be reappointed upon the completion of their term. While in Department of Justice, U.S. Marshal's Service, Northern District of Illinois, cited above, the petitioning AFGE local sought to exclude such employees from its claimed unit, in the instant proceeding the AFGE contends that Term Deputy U.S. Marshals should be included in the unit. The Activity contends that they should not be included in any unit found appropriate, asserting that the limited nature of their appointment precludes them from sharing in the same community of interest as that of the career and career-conditional Deputy U.S. Marshals.

As the evidence developed in the subject case as to Term Deputy U.S. Marshals is substantially the same as that developed in Department of Justice, United States Marshal's Service, Northern District of Illinois, cited above, I find for the reasons enunciated in that case that Term Deputy U.S. Marshals currently employed by the Activity share a clear and identifiable community of interest with the career and career-conditional Deputy U.S. Marshals and that those Term Deputy U.S. Marshals deemed eligible to vote under the Direction of Election set forth below should be included in the unit found appropriate. 10/

10/ Although the periods for which Term Deputy Marshals may be appointed may vary from one to four years, the employees in this classification are appointed for terms not to exceed beyond June 30, 1972. At the time of the hearing herein, the Activity was unable to speculate with any degree of certainty as to whether Term Deputy U.S. Marshals would be employed beyond that date, or whether they would be terminated as of that date. Under all the circumstances, I find that if the employment of these employees has been extended beyond June 30, 1972, they would be included in the claimed unit.

Clerical Employees

The record discloses that the Northern District of Georgia employs approximately 5 clerical and/or administrative employees. The AFGE, would exclude these employees from the unit sought. The Activity agrees with the AFGE with respect to the exclusion of these employees.

As the evidence developed in the subject case as to clerical and/or administrative employees is substantially the same as that developed in Department of Justice, United States Marshal's Service, Northern District of Illinois, cited above, I find for the reasons enunciated in that case that the clerical and/or administrative employees employed by the Activity share a clear and identifiable community of interest with the Deputy U.S. Marshals. In these circumstances, I find that clerical and/or administrative employees of the Activity should be included in the unit found appropriate. 11/

Based on the foregoing, I find the following employees of the Activity constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491:

> All employees of the U.S. Marshal's Service, Northern District of Georgia, including Term Deputy U.S. Marshals and clerical employees, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election subject to the Assistant Secretary's Regulations.

11/ The record further reveals that the Activity employs a classification of Deputy U.S. Marshal designated as "Intermittent" (WAE). These employees are hired outside the Civil Service Commission standards and requirements, and are employed on an "as needed" basis. They do not receive any training other than on the job; do not share in any fringe benefits enjoyed by the other Deputy U.S. Marshals; can expect no promotions; and are paid only when actually employed. On the other hand, such employees share a common mission with employees in the claimed unit and have common duties and supervision. As the record herein does not reflect the frequency of their employment, nor any evidence as to their expectancy of future employment, I find that there is insufficient basis upon which I can make a finding as to their eligibility for inclusion within the appropriate unit.

Eligible to vote are those in the unit who are 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 military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by American Federation of Government Employees, Local 3319, AFL-CIO.

Dated, Washington, D. C.
August 31, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

September 1, 1972

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

ARMY AND AIR FORCE EXCHANGE SERVICE,
ALAMO EXCHANGE REGION,
FORT SAM HOUSTON, TEXAS
A/SLMR No. 199

This case involved a clarification of unit (CU) petition filed by the Activity to clarify an exclusively recognized unit so as to reflect certain organizational changes which occurred since exclusive recognition was granted.

In May 1969, Local Union 2965, American Federation of Government Employees, AFL-CIO (AFGE) was granted exclusive recognition for a unit of employees of the Texoma Area Support Center, Fort Worth, Texas. In September 1970, the Texoma Area Support Center was redesignated as the Texoma Exchange Region. Thereafter, in June 1971, the Texoma Exchange Region was abolished as an organizational and administrative entity of the Army and Air Force Exchange Service, and essentially, all that remained of the operation in Forth Worth was a warehousing operation. Such operation was made a subdivision of the Storage and Distribution Branch of the Alamo Exchange Region, headquartered at San Antonio, Texas.

The Assistant Secretary noted that while the scope of the recognized unit has been diminished due to the reorganization, the remaining employees in the warehouse operation continue to perform the same functions as when recognition was originally granted. Accordingly, the Assistant Secretary found it appropriate to clarify the exclusive recognition to conform the recognition to the existing circumstances resulting from the change in the identity of the Activity precipitated by the agency reorganization.

A/SLMR No. 199

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ARMY AND AIR FORCE EXCHANGE SERVICE,
ALAMO EXCHANGE REGION,
FORT SAM HOUSTON, TEXAS

Activity-Petitioner

and

Case No. 63-2945(CU)

LOCAL UNION 2965,
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Labor Organization

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Royce E. 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,1/ the Assistant Secretary finds:

Local Union 2965, American Federation of Government Employees, AFL-CIO, herein called AFGE, is the exclusive representative of certain employees of the Activity. The Activity filed the clarification of unit petition (CU) herein, seeking to have the unit clarified to reflect certain organizational changes affecting the Activity. The AFGE agrees essentially with the proposed clarification.

On May 13, 1969, the AFGE was granted exclusive recognition for a unit of employees at what was then known as the Texoma Area Support Center, Fort Worth, Texas.2/ In May 1970, a two year collective-bargaining agreement was executed between the Texoma Area Support Center and the AFGE.

In September 1970, as the result of a reorganization, the Texoma Area Support Center was redesignated as the Texoma Exchange Region. Subsequently, in June 1971, the Texoma Exchange Region was abolished as an organizational and administrative entity of the Army and Air Force Exchange Service. At that time, essentially all that remained of the Texoma Exchange Region operation at Fort Worth was a warehouse facility. Pursuant to the reorganization, the warehouse operation was made a subdivision of the Storage and Distribution Branch of the Alamo Exchange Region, which is headquartered at San Antonio, Texas.

The Texoma Area Support Center, for which recognition originally was granted, had approximately 151 hourly employees, of whom 66 or 68 were employed at the warehouse. There were, at that time, approximately 42 salaried employees in the unit. As a result of the reorganization noted above, which left only the warehouse operation, the evidence reveals that the total complement of hourly warehouse employees remaining in the warehouse operation essentially was unchanged. 3/

Before its dissolution, the Texoma Exchange Region was headed by a Chief who reported directly to the Chief of the Army and Air Force Exchange Service, Dallas, Texas. Reporting directly to the Chief of the Texoma Exchange Region were the chiefs of six administrative subdivisions.4/ Since the reorganization, the jobs of the various subdivision chiefs at the Fort Worth location have been abolished. The warehouse operation, which remained at Fort Worth, is under a Warehouse Manager, who reports to an Assistant Chief, Storage and Distribution Branch, Alamo Exchange Region, San Antonio, Texas. Under the Warehouse Manager are three area supervisors.

The record indicates that stationed also at the warehouse are several other employees whose operational divisions were abolished by virtue of the reorganization and who are now organizationally attached to new operations. Thus, while the Data Processing Branch was abolished,

1/ The Activity submitted a brief which was untimely and, therefore, has not been considered.

2/ The unit included all regular full-time and regular part-time HPP (hourly) and USP (salaried) civilian employees employed by the Texoma Area Support Center in Fort Worth, Texas, excluding temporary full-time, temporary part-time and casual employees, supervisory, managerial and executive employees, managerial trainees, personnel employees employed in other than a purely clerical capacity, professional employees, military personnel employed during off-duty hours, guards and watchmen.

3/ There remained also some four supervisory salaried personnel.

4/ The six administrative subdivisions of the Texoma Exchange Region were Inventory Management, Accounting, Personnel, Administration, Data Processing, and Storage and Distribution.

there remain at the warehouse two key punch operators and two verifiers. However, their supervision and organizational attachment are now at San Antonio, Texas, the headquarters of the Alamo Exchange Region. Further, while these employees have some contact with warehouse employees, and it appears that they may have been part of the originally recognized unit prior to the reorganization, the record indicates these employees presently are considered to be included in a unit of employees located at the Alamo Exchange Region headquarters in San Antonio which is represented under an exclusive recognition held by the American Federation of Government Employees, AFL-CIO, Local 2911.

The record reveals also that there are two employees located at the warehouse who are not under the jurisdiction of the Alamo Exchange Region. These are employees of Records Operations, under the Director, Administrative Services Branch, Army and Air Force Exchange Service headquarters, Dallas, Texas. Finally, there is a third group of employees located at the warehouse, who are not a part of the warehouse operation. They comprise what is known as a zone office which performs a technical assistance function for several exchanges in the Region. This office is supervised by a zone manager who reports to the Chief of the Alamo Exchange Region. Under the zone manager, there are three salaried technical representatives, and three hourly employees (a telephone operator, a clerk-typist, and the secretary to the zone manager) who apparently were employed formerly by the Texoma Exchange Region.

In sum, then, the warehouse operation remained functionally unchanged throughout the reorganization. Thus, the unit personnel in the warehouse have not changed due to the reorganization, nor have their duties or responsibilities been altered.

Under these circumstances, I find that while the scope of the recognized unit has been diminished due to an agency reorganization, there remain unit employees at Forth Worth 5/ who continue to perform the same functions in essentially the same manner as when recognition was originally granted under Executive Order 10988. Accordingly, I find it appropriate to clarify the exclusive recognition to conform the recognition involved to the existing

5/ As to any remaining employees at Forth Worth who are not considered to be part of the warehouse operation, there was insufficient evidence to establish whether they were included in the original exclusively recognized unit and, if so, whether they are performing the same job functions at the same location, under the same supervisory hierarchy, and have a continuing community of interest with the warehouse employees. I therefore make no finding as to whether any such employees should be included in the clarified unit.

circumstances resulting from the change in the identity of the Activity precipitated by the agency reorganization.6/

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, in which exclusive recognition was granted on May 13, 1969, to Local Union 2965, American Federation of Government Employees, AFL-CIO be, and hereby is, clarified by including in the exclusively recognized unit all eligible employees who are employed by the Storage and Distribution Branch, Alamo Exchange Region, Army and Air Force Exchange Service, who previously were included in the exclusively recognized unit at the Texoma Area Support Center.7/

Dated, Washington, D.C.
September 1, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

6/ It should be noted also that while ordinarily the appropriate vehicle under the Assistant Secretary's Regulations to effectuate a change in the designation of an agency or activity or an incumbent exclusive labor organization would be a petition for amendment of certification (AC), as noted above, the AFGE local in this matter was recognized under Executive Order 10988 and, therefore, no certification exists. Under these circumstances, I find that the designation of the Activity in this matter may be changed pursuant to the subject CU petition.

7/ As this proceeding involves a petition to clarify an existing exclusively recognized unit, I make no finding with respect to the appropriateness of the unit as recognized originally or the employee classifications included in, or excluded from, the exclusively recognized unit.

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

BETHEL AGENCY,
BUREAU OF INDIAN AFFAIRS,
U. S. DEPARTMENT OF INTERIOR,
BETHEL, ALASKA
A/SLMR No. 200

This case involves a representation petition filed by the American Federation of Government Employees, Local 3315, AFL-CIO (AFGE) for a unit of the Activity's professional teachers employed in the Bethel Agency District Office of the Bureau of Indian Affairs located in Alaska. The Activity is under the jurisdiction of the Juneau Area Office which, in turn, is one of 11 Areas that compose the Bureau of Indian Affairs. The Juneau Area Office is responsible for the affairs of the Alaska Natives (Aleuts, Eskimos, and Indians) within its area of jurisdiction, which covers the entire State of Alaska. The National Council of Bureau of Indian Affairs Educators, Alaska Education Association, affiliated with the National Education Association (NEA), filed a cross-petition seeking a unit of all nonsupervisory, professional educational employees in the Juneau Area of the Bureau of Indian Affairs. Such cross-petition encompassed the unit sought by AFGE.

The Assistant Secretary dismissed the petition of the NEA on the basis that its petition, as amended at the hearing, was untimely filed as the NEA did not cross-petition for the Area-wide unit which included the Bethel Agency employees petitioned for by AFGE until after the prescribed ten-day posting period of the AFGE's petition. Also, the Assistant Secretary ordered that the AFGE's petition be dismissed based on the view that the unit sought was inappropriate. He noted, in this regard, that the evidence established that the professional teachers of the Bethel Agency did not enjoy a community of interest separate and distinct from similarly situated employees throughout the Area in that all Area employees had a common mission, similar skills, education, functions and interests, and were covered by the same Area-wide personnel policies and benefits.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

BETHEL AGENCY,
BUREAU OF INDIAN AFFAIRS,
U. S. DEPARTMENT OF INTERIOR,
BETHEL, ALASKA 1/

Activity

and

Case No. 71-2062 (RO) 2/

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
LOCAL 3315, AFL-CIO

Petitioner

and

NATIONAL COUNCIL OF BUREAU OF INDIAN AFFAIRS
EDUCATORS, ALASKA EDUCATION ASSOCIATION,
AFFILIATED WITH NATIONAL EDUCATION ASSOCIATION 3/

Petitioner

DECISION AND ORDER

Upon petitions duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Dale L. Bennett. The Hearing Officer's rulings made at the hearing are free from prejudicial

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

2/ Two separate petitions were filed in the subject case. However, apparently in view of their related nature, the Area Administrator assigned the same case number to both petitions.

3/ The name of this Petitioner appears as amended at the hearing.

error and are hereby affirmed. 4/

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 American Federation of Government Employees, Local 3315, AFL-CIO, herein called AFGE, seeks an election in the following unit:

> All professional teachers under the control of the Bethel Agency District Office of the Bureau of Indian Affairs. Excluded: All principals, non-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 Order. 5/

The Activity is in agreement with AFGE's proposed unit. The NEA filed a timely cross-petition seeking a unit of all nonsupervisory professional educational employees in the Juneau Area of the Bureau of Indian Affairs. The evidence establishes that after being advised by the Labor-Management Services Administration Area Office that it did not have a sufficient showing of interest in its proposed unit, the NEA amended its petition downward to consist of a unit of all professional educational employees at the Nightmute Day School, Bethel Agency, Juneau Area, Bureau of Indian Affairs. At the hearing in this matter, the NEA attempted to reinstate, by amendment of its petition, the proposed unit it had designated initially in its original cross-petition. As noted in footnote 4 above, I find that the NEA's request to amend its petition was appropriate and, therefore, such petition will be considered as reflected by the proposed amendment.

As amended, the NEA's petition would encompass all eligible employees of the Juneau Area of the Bureau of Indian Affairs, including those of the Bethel Agency District Office petitioned for by the AFGE. In view of the fact that the NEA's amended petition now includes the Bethel Agency employees sought by the AFGE, I find that the NEA's petition is untimely within the meaning of Section 202.5(b) of the Assistant Secretary's Regulations. 6/ Thus, the record reveals that although the NEA's initial cross-petition for the Area-wide unit was filed timely during the prescribed ten-day posting period of the AFGE's petition for the less comprehensive Bethel Agency unit, the NEA failed to support its cross-petition by submitting a valid showing of interest during such period. In view of its inadequate showing of interest in an Area-wide unit and apparently to maintain its status as a party in this matter, the NEA chose to amend its Area-wide petition to include only the Nightmute Day School in which unit it had a sufficient showing of interest. It is clear that the NEA's subsequent attempt at the hearing to amend its petition covering the Nightmute Day School to encompass an Area-wide unit was long after the prescribed ten-day posting period had ended with respect to the AFGE's petition covering the Bethel Agency. 7/ Under these circumstances, I find that because the NEA's petition as amended at the hearing encompassed the unit petitioned for by the AFGE, the NEA was required, pursuant to Section 202.5(b) of the Assistant Secretary's Regulations, to file such petition during the ten-day posting period with respect to the AFGE's petition, and to support such petition with the prescribed showing of interest. As the NEA's petition as amended at the hearing did not meet the above-noted requirements of the Regulations, I shall order that its petition be dismissed.

4/ I find that the Hearing Officer erred when, at the hearing in this matter, he denied the motion of National Council of Bureau of Indian Affairs Educators, Alaska Education Association, affiliated with National Education Association, herein called NEA, to amend its petition. The Hearing Officer should have granted the amendment and referred the matter to the Regional Administrator for appropriate action with respect to such matters as timeliness and the adequacy of the NEA's showing of interest. The Hearing Officer's ruling in this regard is hereby reversed and I have considered the unit description herein to reflect the change the NEA sought to make through amendment of its petition. Because I have considered the NEA's position as reflected in its proposed amended petition, I do not find the Hearing Officer's ruling to constitute prejudicial error. Cf. Department of the Army, Military Ocean Terminal, Bayonne, New Jersey, A/SLMR No. 77, footnote 2.

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

6/ Section 202.5(b) of the Assistant Secretary's Regulations provides that, "A labor organization seeking exclusive recognition in a unit which encompasses any portion of the unit petitioned for must file a petition with the Area Administrator supported by a showing of interest of thirty (30%) percent or more of the employees in the unit it claims to be appropriate within ten (10) days after the initial date of posting of the notice of petition as provided in Section 202.4(b) unless good cause is shown for extending the period." (emphasis added)

7/ The posting period with respect to the AFGE's petition ended on February 26, 1972.

The Juneau Area is one of 11 Areas that compose the Bureau of Indian Affairs, herein after called BIA, and is responsible for the affairs of the Alaska Natives (Aleuts, Eskimos, and Indians) within its area of jurisdiction. The scope of the Juneau Area includes the entire State of Alaska with the Area Headquarters located in Juneau, Alaska. The Area Director is responsible for the operation of the Area and, in this connection, he has line authority over all operating and administrative divisions of the Area. In this regard, responsibility for labor relations is in the Area Director and agreements are negotiated through the cooperative efforts of the respective operating offices and the Area Office.

The Juneau Area has 4 Agencies which are responsible for the operation of the Area's 53 day schools. In this regard, the Bethel Agency has 34 separate school units; the Nome Agency has 12; the Fairbanks Agency has 6; and the Southeast Agency has 1. Each day school is headed by a Principal who is in charge of the total operation of his school. Each boarding school is headed by a Superintendent under whom there is a Principal. Almost all schools have a local advisory school board, composed of local Alaska Natives, who act as an advisory body for that school. In the Juneau Area there are approximately 5,472 students enrolled in the day and boarding schools and there are approximately 1,288 employees of the Juneau Area, including some 359 educational employees.

Area-wide policies and procedures are developed at the Area level. Thus, the Area is responsible for planning, coordinating, and administering the Area education program to meet the needs of the Native children. Also, the Area is responsible for planning, developing, and administering the Area-wide programs which involve such matters as plant operations, custodial services and garbage disposal, maintenance, repair and improvement, and utilization of plant facilities. The Area is responsible for the development and administration of the personnel management programs within the Area. In this regard, it formulates policies and procedures to carry out approved programs; administers staffing, classification, wage administration, employee and labor relations, training and other related personnel functions; and makes recommendations on the personnel budget. The personnel policies as they affect teachers are the same in each of the agencies within the Area. Promotional opportunities for teachers are on an Area-wide basis and the Area Office certifies the list of eligible employees. The Area Office determines the priority of needs among the various agencies, makes the actual teaching appointments, and renders assistance in assignment of duty stations. While informal grievances are handled at the agency level, formal grievances and employee appeal rights begin at the Area Office level. Further, the Area Office is responsible for the administration of the Area budget and finance program in accordance with applicable Bureau directives, policies, and procedures.

At the Bethel Agency level the Office of the Superintendent is responsible to the Area Director for planning, executing, and operating all BIA activities within the Agency. To assist the Superintendent in these responsibilities are eight staff offices and divisions. These Agency staff offices and divisions correspond generally with staff offices and divisions of the Juneau Area Office. The educational function within the Agency is handled by the Division of Education. This Division is headed by an Education Program Administrator who, in turn, is supported by a staff of administrative specialists as well as by principals, teachers, cooks, and maintenance personnel. The function of the Division of Education is to provide elementary education and special education for the children within the Agency.

The day school Principal is the Agency's line officer directly responsible for a particular post or station within the Agency. With one exception all principals in the Bethel Agency have teaching duties. 8/ The Principal exercises administrative and technical supervision over other teachers, and normally has a staff of some three to seven professional and subprofessional personnel and custodial employees. He has the responsibility of operating and maintaining the facility, approves or disapproves leave, hires training instructors, selects maintenance personnel, janitors, cooks and educational aides, determines what supplies are needed, authorizes overtime without prior authorization, can close a school without review if conditions warrant, evaluates the performance of employees, and adjusts complaints. 9/

Based on the foregoing, I find that a unit of professional teachers confined to the Bethel Agency District Office, as sought by the AFGE, is not appropriate. 10/ Thus, it is clear from the record that the teachers, on an Area-wide basis, have similar skills, education, functions, and

8/ Hooper Bay, which is the largest school in the Agency, has a full-time Principal and 10 teachers.

9/ Based on the above-noted duties and responsibilities of the day school Principals, I find that they are supervisors within the meaning of the Order.

10/ In view of the disposition herein, it was considered unnecessary to decide whether "professional teachers" share a community of interest separate and apart from other employee classifications in the Area, such as guidance counselors and educational specialists. Cf. Department of Interior, Bureau of Indian Affairs, Navajo Area, Gallup, New Mexico, A/SLMR No. 99.

interests, and are involved directly in a common mission - i.e., the education and welfare of Native children. Additionally, the evidence demonstrates that there is substantial Area-wide administrative and operational control exercised by the Area Office and that employees in similar classifications throughout the Area are covered by the same personnel policies and benefits. Under these circumstances, I find that a unit of teachers limited in scope to those of the Bethel Agency is not appropriate for the purpose of exclusive recognition. 11/ Moreover, I find that such a fragmented unit would not promote effective dealings and efficiency of agency operations. Accordingly, I shall order that the AFGE's petition be dismissed. 12/

ORDER

IT IS HEREBY ORDERED that the petitions in Case No. 71-2062 (RO) be, and they hereby are, dismissed.

Dated, Washington, D. C.
September 25, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

11/ Cf. Department of Interior, Bureau of Indian Affairs, Navajo Area, Gallup, New Mexico, cited above.

12/ It should be noted that as there has not been a posting of a notice of petition in an Area-wide unit, no bar would exist to the filing of a new petition covering such a unit.

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

U. S. NAVAL AIR STATION,
QUONSET POINT, RHODE ISLAND
A/SLMR No. 201

This case involves a severance request by the International Association of Fire Fighters, Local F-158, AFL-CIO (IAFF), for a unit of fire fighters currently included in an Activity-wide unit represented by the National Association of Government Employees, R1-7 (NAGE). The Activity and NAGE took the position that the fire fighters shared a community of interest with other employees in the overall unit, that there has been a stable bargaining relationship for many years and that there are no unusual circumstances which would warrant severance.

The Assistant Secretary, applying his policy enunciated in United States Naval Construction Battalion Center, A/SLMR No. 8, denied the severance request and dismissed IAFF's petition. In reaching his decision, the Assistant Secretary considered the fact that there are presently four stewards who are in the fire fighter classifications; that grievances have been handled by the NAGE for employees in the Security Department; and that the IAFF had not presented any evidence that the NAGE had refused or neglected to represent any employees in the claimed unit.

A/SLMR No. 201

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. NAVAL AIR STATION,
QUONSET POINT, RHODE ISLAND 1/

Activity

and

Case No. 31-5476

INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, LOCAL F-158, AFL-CIO

Petitioner

and

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, R1-7

Intervenor

DECISION AND ORDER

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

Upon the entire record in this case, including the briefs of the Activity and the Petitioner, International Association of Fire Fighters, Local F-158, AFL-CIO, herein called IAFF, 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 corrected at the hearing.

2. The IAFF seeks to sever a unit of all fire fighters in the classifications GS-3 trainee, GS-4 fire fighter general, GS-5 fire fighter general, GS-6 captain, 2/ and GS-7 inspector, employed at the U.S. Naval Air Station, Quonset Point, Rhode Island, from an Activity-wide unit of employees currently represented on an exclusive basis by the Intervenor, the National Association of Government Employees, R1-7, herein called NAGE. In this regard, the IAFF contends that the claimed employees would constitute an appropriate unit and that they have not been represented effectively and fairly by the NAGE.

In 1966 the NAGE was granted exclusive recognition in an Activity-wide unit, covering all employees, except some 48 employees who were already represented in exclusively recognized units. Since the time exclusive recognition was granted to the NAGE, collective bargaining agreements continually have been in effect. 3/

The Activity takes the position that: (1) the community of interest of the fire fighters is submerged in the broader community of interest of all Activity employees represented by the NAGE; (2) there has been a stable bargaining history with the NAGE for many years; (3) there are no unusual circumstances that would warrant a carve-out; and (4) the facts in this case are not distinguishable from other decisions of the Assistant Secretary in which he refused to carve out employees from exclusively recognized units. The NAGE agrees with the Activity's position and also notes that the fire fighters in the claimed unit are represented presently by four stewards and that it (the NAGE) has represented the fire fighters in the past and will continue to do so in the future.

The mission of the Naval Air Station at Quonset Point is to provide administrative logistic support and operational facilities to the operating forces and tenant commands 4/ located at its facility. There are approximately 1,126 employees located at the Activity in several departments, such as administration, comptroller, aircraft maintenance, air operations, public works, supply and security.

2/ During the hearing, the parties stipulated that they would defer to a decision of the Federal Labor Relations Council (FLRC) in a pending appeal in Department of the Navy, Mare Island Naval Shipyard, A/SLMR No. 129, regarding the eligibility status of the GS-6 fire captains. In view of the disposition of the petition herein, I find it unnecessary to make any finding regarding the eligibility of the GS-6 fire captains.

3/ The petition in the subject case was filed timely.

4/ The tenant commands include: a Naval Air Rework Facility, a Naval Hospital, Fleet Weather, COMFAIR and a Navy Commissary.

The fire fighters involved herein work in the Fire Division of the Security Department, which also contains an Administrative Division and an Investigative Division. The mission of the Fire Division is to provide fire protection for the Activity and its tenants. It also provides assistance to 26 surrounding civilian communities. The Fire Division is composed of a structural branch, which is responsible for fighting fires in buildings and structures, and an airport branch, which is exclusively engaged in fire protection with respect to the air field in the event of a crash or oil spill. Fire fighters in the structural branch work out of two stations, one at the Naval Air Station and one at Davisville, while fire fighters in the airport branch work at Station No. 3 located in the air operations building, which houses also air operation personnel, tower personnel, photographers and administrative personnel.

There are a total of 88 employees in the Fire Division, including the fire chief (GS-11) and two supervisory fire fighters (GS-9). As noted above, they are housed at three stations. Fire fighters work three 24-hour shifts per week, for a total of 72 hours, and receive a 22½ percent differential for such shift work. In addition to fire fighters, the record reveals that employees in the Public Works Department's Utility Division work various shifts, as do employees in the Data Processing and Communications Departments. Like the fire fighters, these employees receive a differential in pay. 5/ The record reveals also that, in addition to fire fighters, other Activity employees, such as those in maintenance, snow removal, communications and its telephone operators, work during inclement weather conditions when other non-essential employees are released from work.

The record discloses that the civilian personnel office handles the personnel functions, such as staffing, reductions in force, promotions, position classifications, transfers, etc., for all employees on the base, including fire fighters. In this connection, since 1967 there have been 20 employee transfers from other departments of the Activity into the Fire Division and one employee transfer out of the Fire Division to another department. The evidence establishes further that in August 1971, four employees from other Activity departments "bumped" into the Fire Division as a result of a reduction in force. Moreover, the system for promotions with respect to the fire fighters is similar to that utilized by all other Activity departments, and fire fighters have access to various base facilities, such as cafeterias, credit unions, banks and medical facilities. Also, fire fighters receive the same fringe benefits, such as annual leave, sick leave and hospitalization insurance, as all other Activity employees.

5/ The differential amounts to 10 percent as compared to the 22½ percent received by the fire fighters.

Since 1966, when the NAGE became the exclusive representative of the employees of the Activity, the fire fighters have been, and currently are, represented by four stewards who are in fire fighter classifications. The record reveals that these stewards deal with the employees' immediate level of supervision in handling their grievances, whereas officers of the NAGE local deal with higher levels of supervision in the processing of grievances in accordance with the formal steps of the contractual grievance procedure. In this regard, the evidence establishes that the NAGE officials consulted with the Activity's Security Department officials on 2 or 3 occasions within the past year regarding employee complaints and grievances. Further, there was no evidence that the NAGE had at any time refused to represent fire fighters in grievance matters. In addition to the foregoing, the record reveals that pursuant to the provisions of the parties' negotiated agreement, by-monthly meetings are held between the NAGE officers, its chief steward and the base commander and various civilian personnel officials, wherein the parties discuss matters of general concern to all employees in the bargaining unit. 6/

Based on the foregoing, I find that the petitioned for unit of fire fighters is not appropriate for the purpose of exclusive recognition in the absence of any evidence that the existing exclusive representative, the NAGE, has failed to represent such employees fairly and effectively. 7/ As I stated in United States Naval Construction Battalion Center, A/SLMR No. 8, "where the evidence shows that an established, effective and fair collective-bargaining relationship is in existence, a separate unit carved out of the existing unit will not be found appropriate except in unusual

6/ While the parties' negotiated agreement is silent as to the fire fighter classification, it also is silent as to other classifications of employees included within the bargaining unit.

7/ Although the IAFF attempted to show that the NAGE had not properly or effectively represented the fire fighters, it was unable to present any evidence to support its contention. In this connection, during the hearing the representative of the IAFF moved to postpone the hearing so as to enable him to question the fire chief, an admitted supervisor and a management official, in regard to this issue. The fire chief had entered the hospital on the morning of the hearing for medical tests. The Activity and the NAGE opposed the motion because, in their view, such evidence could be obtained from other witnesses, including Activity employees. Although the Hearing Officer granted a recess to permit the IAFF to obtain witnesses, the IAFF was apparently unable to do so.

(Continued)

circumstances." I find that the record fails to establish that any such "unusual circumstances" exist in the instant case. Accordingly, I find the unit sought by the IAFF is inappropriate for the purpose of exclusive recognition and I shall, therefore, dismiss its petition. 8/

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 31-5476 be, and it hereby is, dismissed.

Dated, Washington, D. C.
September 25, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

7/ The Hearing Officer denied the motion to postpone the hearing and accepted a written offer of proof which he had requested earlier. After careful consideration of the entire record, including the offer of proof by the IAFF and its motion to reopen the record contained in its brief, I conclude that no prejudicial error was committed and that the Hearing Officer did not act in an arbitrary or capricious manner in denying the IAFF's motion. Thus, in my opinion, the IAFF had ample opportunity to prepare its case in this matter and to obtain witnesses to support its position. Under these circumstances, the Hearing Officer's ruling is affirmed and the motion by IAFF to reopen the record is denied.

8/ See United States Naval Air Station, Moffett Field, California, A/SLMR No. 130 and Department of the Navy, Naval Air Station, Corpus Christi, Texas, A/SLMR No. 150.

September 25, 1972

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,
INDIANAPOLIS, INDIANA AREA OFFICE
A/SLMR No. 202

This case involved a clarification of unit (CU) petition filed by the U. S. Department of Housing and Urban Development (HUD), Indianapolis, Indiana Area Office, seeking clarification of an existing exclusively recognized bargaining unit in order to have it conform to changes in its organizational structure. Specifically, the Activity contended that the currently certified unit represented by Local 1803, National Federation of Federal Employees (NFFE) was no longer appropriate inasmuch as pursuant to an agency reorganization, the Federal Housing Administration Indianapolis Insuring Office, the Activity in which the certified unit existed, had been superseded by the HUD Indianapolis Area Office. It was asserted that such reorganization added new programs and required new employees and that an appropriate unit now would consist of all eligible employees of the HUD Area Office. The NFFE contended that the additional employees constituted an accretion to its certified unit, and that an integration of the work force existed which would be sufficient to establish a community of interest among all employees of the Area Office. It further contended that a certification bar should have precluded the filing of the Activity's petition.

The Assistant Secretary noted that in Headquarters, U. S. Army Aviation Systems Command, St. Louis, Missouri, A/SLMR No. 160, it was found that a CU petition is an inappropriate vehicle to seek a determination that a recognized unit is no longer appropriate due to a reorganization. However, rather than dismiss the petition for technical reasons, he treated the HUD petition as if it had been filed appropriately as an RA petition.

The evidence established that the employees in the certified unit generally continued to perform the same duties as they had prior to the reorganization, with the new employees performing the added functions. Further, the record failed to reveal any significant degree of interchange, transfer or commingling between the new HUD employees and the employees of the former Insuring Office.

In these circumstances, the Assistant Secretary found that despite the reorganization, there still remained a viable and identifiable group of employees performing the duties of the former FHA Insuring Office. He, therefore, found insufficient basis to support the Activity's contention that the unit represented by the NFFE was no longer appropriate. Accordingly, he ordered that the petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT,
INDIANAPOLIS, INDIANA AREA OFFICE

Activity-Petitioner

and

Case No. 50-5593(25)

LOCAL 1803, NATIONAL FEDERATION
OF FEDERAL EMPLOYEES

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 David R. Shadrach. 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 Local 1803, National Federation of Federal Employees, herein called NFFE, the Assistant Secretary finds:

The Petitioner, U. S. Department of Housing and Urban Development, Indianapolis, Indiana Area Office, herein called HUD Area Office, filed the subject petition for clarification of unit (CU) seeking to clarify an existing exclusively recognized bargaining unit in order to have it conform to changes in its organizational structure. Specifically, the Activity contends that the currently certified unit represented by the NFFE is no longer appropriate because, pursuant to an agency reorganization, the former Federal Housing Administration (FHA) Indianapolis Insuring Office -- the Activity in which the certified unit existed -- has been superseded by the HUD Area Office. Such reorganization resulted in the addition of new programs as well as the employment of new employees to implement them. In these circumstances, the Activity contends that a question concerning representation is raised and it submits that an appropriate unit now would consist of all eligible employees of the HUD Area Office.

The NFFE contends that the addition of new employees and new functions has not radically changed the composition of the existing unit, that any new employees have been intermingled with the unit employees, that many of the unit employees continue to perform the functions they performed prior to the reorganization and that personnel practices, policies and working conditions have remained the same. Additionally, the NFFE contends that the Activity's petition is barred under the Section 202.3(b) of the Assistant Secretary's Regulations. 1/

As stated in Headquarters, U. S. Army Aviation Systems Command, St. Louis, Missouri, A/SLMR No. 160, a CU petition is a vehicle by which parties may seek to illuminate and clarify, consistent with their intent, the unit inclusions or exclusions after the basic question of representation has been resolved. It is not the proper mechanism to question the appropriateness of an employee bargaining unit or to resolve issues concerning whether or not the unit employees desire to continue to be represented exclusively. In the subject case, the Activity, by seeking a determination that the exclusively recognized unit is no longer appropriate, is, in effect, attempting to raise a question concerning representation. Under Section 202.2(b) of the Assistant Secretary's Regulations, the sole procedure available to an agency or activity to enable it to raise a question concerning representation is a petition for an election to determine if a labor organization should cease to be the exclusive representative (RA). 2/ However, in the particular circumstances of the instant case, I am of the opinion that to dismiss the petition filed by the Activity at this post-hearing stage of the proceeding on the basis that it filed the wrong type of petition would be overly technical and improper. Consequently, in my consideration of this case, I shall treat the petition as if it had been filed as an RA petition. 3/

The record reveals that in 1970 HUD began a reorganization which was designed to delegate more control of its operations to Regional and Area Office levels. As part of this reorganization, in September 1971, the FHA Indianapolis Insuring Office was upgraded to the status of a HUD Area Office. The function of the FHA Insuring Office was to insure mortgages on single-and multiple-family housing units. The HUD Area Office includes this function and, in addition, is responsible for other HUD programs, including urban renewal, model cities, public facilities, low-rent, and comprehensive planning.

On June 8, 1971, prior to the above-noted reorganization, the NFFE was certified as the exclusive representative of a unit of approximately

1/ Section 202.3(b) provides, in pertinent part, "When there is a recognized or certified exclusive representative of the employees, a petition will not be considered timely if filed within twelve (12) months after the grant of exclusive recognition or certification as the exclusive representative of employees in an appropriate unit..."

2/ Section 202.2(b) provides, in pertinent part, that an agency or activity should support an RA petition with a statement that it has a good faith doubt that the currently recognized or certified labor organization represents a majority of the employees in the unit.

3/ Cf. Headquarters, U. S. Army Aviation Systems Command, St. Louis, Missouri, cited above.

95 nonsupervisory, nonprofessional employees of the FHA Indianapolis Insuring Office. The record reveals that in November 1971 when the CU petition in the subject case was filed there were approximately 142 employees in the HUD Area Office performing in the above-mentioned programs.

The record discloses that the agency reorganization has not affected substantially the terms and conditions of employment of the former Insuring Office employees. Thus, the evidence indicates that a substantial majority of the HUD Area Office employees are former FHA Insuring Office employees, that virtually all of them are engaged in performing the continuing FHA responsibilities in the same jobs and often under the same immediate supervision. Also, it appears from the record that few former FHA employees have been transferred into the newly added HUD-type programs. While the Activity indicated its intention to cross-train FHA employees so that, ultimately, they can be utilized in the HUD social oriented programs, it appears that such training has not yet taken place but, rather, will be effectuated in the future under an Area Office training program. In sum, therefore, the record indicates that the same Insuring Office functions are being performed by the unit employees of the former Insuring Office and that the added programs are being carried out by new employees. In addition, the evidence discloses that the transfer of employees from one program to the other has been minimal.

Under the circumstances presented in this case, I find insufficient basis to support the Activity's contention that the unit represented by the NFFE is no longer appropriate. Thus, the evidence adduced at the hearing establishes that, notwithstanding the reorganization, there still remains a viable and identifiable group of employees performing the former FHA Insuring Office functions. Moreover, the evidence fails to reveal any significant degree of interchange, transfer or commingling between the new employees and the employees of the former Insuring Office. In these circumstances, I shall dismiss the petition herein. 4/

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 50-5593(25) be, and it hereby is, dismissed.

Dated, Washington, D. C.
September 25, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

4/ In view of the finding herein that the existing certified unit has remained viable and identifiable despite the agency reorganization, it was unnecessary to decide the effect, if any, the prescribed certification bar rule would have on the subject petition if the scope and character of the unit had been changed.

September 25, 1972

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

U.S. DEPARTMENT OF THE ARMY,
PICATINNY ARSENAL,
DOVER, NEW JERSEY
A/SLMR No. 203

The Petitioner, Local 225, American Federation of Government Employees, AFL-CIO, (AFGE), sought an election in a unit composed of all nonprofessional General Schedule employees of the Arsenal located geographically at the Picatinny Arsenal, Dover, New Jersey, and of the Headquarters and Installation Support Activity (HISA) at the same location. The Wage Board employees in the Arsenal and HISA are represented currently by the AFGE. The Activity agreed that the unit sought was appropriate. The Intervenor, Local 1437, National Federation of Federal Employees (NFFE), contended that the claimed unit was inappropriate in that the employees petitioned for do not share a clear and identifiable community of interest separate and distinct from employees in similar classifications employed in the Headquarters of the U.S. Army Munitions Command (MUCOM H.Q.) which is located also at the Picatinny Arsenal.

The Assistant Secretary found that a unit limited to the General Schedule employees of the Arsenal and HISA was not appropriate for the purpose of exclusive recognition. In this connection, he noted that employees of MUCOM H.Q., the Arsenal, and HISA are subject to the same personnel policies and procedures which are administered centrally; the area of consideration for promotions includes MUCOM H.Q., as well as the Arsenal and HISA; there are similar employee job classifications with substantially the same job functions in MUCOM H.Q., HISA, and the Arsenal; there have been a number of transfers between these three elements; and the Project Managers of MUCOM H.Q. utilize the facilities and personnel of the Arsenal in carrying out their missions.

In these circumstances, the Assistant Secretary found that the General Schedule employees of the Arsenal and HISA do not have a clear and identifiable community of interest separate and distinct from other employees located at the Picatinny Arsenal and that such a fragmented unit would not promote effective dealings and efficiency of agency operations. Accordingly, the Assistant Secretary dismissed the petition.

A/SLMR No. 203

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF THE ARMY,
PICATINNY ARSENAL,
DOVER, NEW JERSEY

Activity

and

Case No. 32-2283(RO)

LOCAL No. 225, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Petitioner

and

LOCAL 1437, NATIONAL FEDERATION
OF FEDERAL EMPLOYEES

Intervenor

DECISION AND ORDER

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

Upon the entire record in this case, including the briefs of the parties, 1/ 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 of all nonprofessional Class Act (General Schedule) employees of the Activity, excluding management officials and supervisors, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, firefighters, employees of the Microdata Branch and employees whose primary function is the preparation of technical drawings, including illustrators (Technical Equipment), mechanical engineering technicians, (drafting), engineering draftsmen, telephone operators, and all Wage Board employees, temporary employees and interns. Also excluded are employees of the following tenant activities serviced by Picatinny Arsenal: Headquarters, U. S. Army Munitions Command, Office of USAMC Project Manager for Selected Ammunition, Office of USAMC Project Manager for 2.75" Rocket System, Office of USAMC Product Manager for Safeguard Munitions, USAMC Security Field Office, U. S. Army Special Security Department, and U.S. Marine Corps Reserve Training Center. 2/

The NFFE contends that the unit sought by the AFGE is not appropriate in that employees in the proposed unit do not share a clear and identifiable community of interest separate and distinct from employees in similar classifications employed in the Headquarters of U.S. Army Munitions Command and from professional employees of the Activity. The Activity is of the view that the unit sought by AFGE is appropriate.

The three main organizational elements located geographically at the Picatinny Arsenal, Dover, New Jersey are: the United States Army Munitions Command Headquarters, herein called MUCOM H.Q., an Arsenal under MUCOM H.Q., herein called the Arsenal; and a Headquarters and Installation Support Activity, herein called HISA. The employees sought by the AFGE include all of the General Schedule employees of the Arsenal and HISA. On the other hand, the AFGE does not seek any of the employees of MUCOM H.Q. 3/ There is no history of bargaining with respect to the petitioned for employees. However, the record establishes that four labor organizations 4/ have been accorded exclusive recognition in seven separate units at the Picatinny Arsenal. In this connection, the record reveals further that all the Wage Board

1/ The Petitioner, Local No. 225, American Federation of Government Employees, AFL-CIO, herein called AFGE, moved that the brief of the Intervenor, Local 1437, National Federation of Federal Employees, herein called NFFE, be rejected as a reply brief. I find that the NFFE's brief was filed timely and did not constitute a reply brief. Accordingly, the AFGE's motion is hereby denied.

2/ The unit appears as amended at the hearing.

3/ In addition to the three principal organizational elements at Picatinny Arsenal, there are some tenant organizations at the Activity. The petitioned for unit does not include any employees of the tenant organizations, nor does it include employees of the Arsenal and HISA who are covered by exclusive recognitions.

4/ American Federation of Government Employees; Federal Uniformed Fire Fighters; Office and Professional Employees International Union; and Federal Employees Council.

employees of the Arsenal and of HISA currently are included in exclusively recognized units, but that none of the Wage Board or General Schedule employees of MUCOM H.Q. are in exclusively recognized units.

The Munitions Command is one of eight commodity commands under the Army Materiel Command. MUCOM H.Q., located at the Picatinny Arsenal, has as its mission the life-cycle management of assigned munitions, i.e., procurement, production, inventory control, and maintenance. In performance of its mission it constitutes the headquarters for a nationwide ammunition plant complex which includes three arsenals (including the arsenal at Picatinny) and the Ammunition Procurement and Supply Agency, which manages 24 government owned, contractor operated, munitions plants. There are four Project Managers organizationally attached to MUCOM H.Q. who have a managerial responsibility for control of funds and work performed on specific projects and who report to the Commanding General, Munitions Command.

The Arsenal is one of four principal installations charged with physical implementation of the MUCOM mission. Its mission is research and development and it is the Development and Engineering Center for nuclear munitions, bombs, mines, grenades, pyrotechnics, fuses, rockets, and artillery and mortar ammunition.

HISA is another subordinate command located at the Picatinny Arsenal and is comprised of two former components of the Arsenal; the Staff Services Office and the Installation Support Activity. As a result of an Army Materiel Command reorganization HISA became operational on June 25, 1971. The Arsenal and HISA are under separate commanding officers, who report to the Commanding General, Munitions Command. The mission of HISA, is to furnish the physical plant and administrative and logistical support to MUCOM H.Q., the Arsenal, and tenant activities located at Picatinny Arsenal. Such support functions include equipment management, non-appropriated fund activities, family housing, supply, transportation, plant engineering and maintenance, property disposal, communications, printing, mail, internal security and intelligence.

The record reflects that there is a single central civilian personnel office organizationally located at Picatinny Arsenal which services the employees of the Arsenal, MUCOM H.Q., and HISA. The employees of these three organizational elements are subject to common personnel policies and practices. Although, since the recent establishment of HISA, there are now three competitive areas for the purpose of "bumping" in reduction-in-force actions, the Arsenal, MUCOM H.Q., and HISA constitute a single area of consideration with respect to promotions. In addition, the record discloses that there are transfers of employees between the three elements and that temporary details to other organizational elements occur. The record indicates that the civilian employees of MUCOM H.Q., the Arsenal, and HISA work in close geographical proximity, share common facilities, such as cafeterias and the credit union, and are employed under similar working conditions. Moreover, it appears from the record that there are nonprofessional General Schedule employees at MUCOM H.Q., with job skills, duties and qualifications, as well job classifications, which are similar to those of the General Schedule employees in the claimed unit located in the Arsenal and HISA. The record reflects also that the Project Managers of MUCOM H.Q., use the facilities and personnel of the Arsenal in the accomplishment of their missions and, as noted above, HISA provides services and facilities for MUCOM H.Q., as well as the Arsenal.

Based on the foregoing, I find that a unit limited to the General Schedule employees of the Arsenal and HISA is not appropriate for the purpose of exclusive recognition. In this regard, as noted above, employees of MUCOM H.Q., the Arsenal, and HISA are subject to the same personnel policies and procedures which are administered centrally; the area of consideration for promotions includes MUCOM H.Q., as well as the Arsenal and HISA; there are similar employee job classifications with substantially the same job functions in MUCOM H.Q., HISA, and the Arsenal; there have been a number of transfers between these three elements; and the Project Managers of MUCOM H.Q. utilize the facilities and personnel of the Arsenal in carrying out their missions.

In these circumstances, I find that the General Schedule employees of the Arsenal and HISA do not have a clear and identifiable community of interest separate and distinct from other employees located at Picatinny Arsenal. Further, in my view, such a fragmented unit would not promote effective dealings and efficiency of agency operations. Accordingly, I shall order that the AFGE's petition herein be dismissed. 5/

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 32-2283(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
September 25, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

5/ In view of this disposition, it was considered unnecessary to make determinations concerning the eligibility of certain disputed employee classifications.

September 25,1972

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 INTERIOR,
BUREAU OF RECLAMATION-REGION 4,
WEBER BASIN JOB CORPS CIVILIAN
CONSERVATION CENTER,
OGDEN, UTAH
A/SLMR No. 204

The Petitioner, American Federation of Government Employees, AFL-CIO, Local 3284, (AFGE) sought an election in a unit composed of all professional and nonprofessional Wage Board and General Schedule employees of the Weber Basin Job Corps Civilian Conservation Center, Ogden, Utah. The Weber Basin Job Corps Center is one of two Job Corps Centers in Region 4 of the Bureau of Reclamation. The Activity took the position that the petitioned for unit was appropriate and that the unit would promote effective dealings and efficiency of agency operations.

The Assistant Secretary found that the petitioned for unit was appropriate for the purpose of exclusive recognition. In this connection, the Assistant Secretary noted that the mission of the Bureau of Reclamation was natural resource conservation and management which differs essentially from the Job Corps' mission of human resource development; that employees of the Job Corps Centers and the Bureau of Reclamation differ in their job classifications and functions, that the Job Corps Centers in Region 4 are separately supervised and Job Corps Center Directors report to the U.S. Department of Labor as well as the Bureau of Reclamation, and that there has been no interchange between Job Corps Centers and other Region 4 operating offices. In reaching the finding that a unit limited to employees of the Weber Basin Job Corps Center is appropriate, the Assistant Secretary noted that the other Job Corps Center in Region 4, at Collbran, Colorado, is located some 360 miles from Weber Basin, that there has been no interchange between the two Centers, and that each Center is under different immediate supervision. In these circumstances, the Assistant Secretary found employees of the Weber Basin Job Corps Center share a clear and identifiable community of interest separate and distinct from other employees of Region 4 and such a unit of employees would promote effective dealings and efficiency of agency operations.

The Assistant Secretary further found that employees designated Training Instructor (Social Skills) and Group Leader are not supervisors within the meaning of the Order and should be included in the unit found appropriate. The Assistant Secretary concluded also that employees designated Corpsmen Supervisor and Corpsmen Assistant Supervisor are supervisors within the meaning of the Order and that the Principal-Teacher is a supervisor. Therefore, these classifications were excluded from the unit found appropriate. In addition, the Assistant Secretary found that teachers and guidance counselors in the GS-1710 classification series meet the criteria for professional employees.

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

A/SLMR No. 204

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. DEPARTMENT OF INTERIOR,
BUREAU OF RECLAMATION-REGION 4,
WEBER BASIN JOB CORPS CIVILIAN
CONSERVATION CENTER,
OGDEN, UTAH 1/

Activity

and

Case No. 61-1545(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3284

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 Chester A. Jones. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Assistant Secretary finds:

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

2. The Petitioner, American Federation of Government Employees, AFL-CIO, Local 3284, herein called AFGE, seeks an election in a unit of all professional and nonprofessional, Wage-Grade (Wage Board) and General Schedule employees, including temporary full-time employees working in excess of 90 days, of the Weber Basin Job Corps Civilian Conservation Center at Military Springs, Odgen, Utah, 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. 2/

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

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

The Activity takes the position that the petitioned for unit is appropriate for the purpose of exclusive recognition, and that such a unit would promote efficiency of operations and effective dealings.

The Bureau of Reclamation is a bureau in the United States Department of Interior. It consists of the Office of the Commissioner of Reclamation in Washington, D.C.; an Engineering and Research Center located in Denver, Colorado; and seven Regional Offices, corresponding generally to river basins or combinations of river basins, located throughout the western United States.

The Regional Office for Region 4 is located in Salt Lake City, Utah, and is headed by a Regional Director under whom are nine headquarters Divisions. Also under the Regional Office are nine operating offices located throughout the Region which are headed by officers who report directly to the Regional Director. These include five Projects Offices, a Development Office, a Power Operations Office, and two Job Corps Centers. The two Job Corps Centers are the Collbran Job Corps Center near Collbran, Colorado, and the Weber Basin Job Corps Center, located near Ogden, Utah, which contains the employees in the petitioned for unit.

The mission of the Bureau of Reclamation is to enhance and protect the environment and improve the quality of life through development of water and other related resources throughout the 17 contiguous western states and Hawaii. The Bureau locates, constructs, operates and maintains works for the storage, conversion, and development of water for the reclamation of arid and semi-arid lands. Its projects provide for irrigation, municipal and industrial water supply, hydro-electric power generation and transmission, water quality improvement, fish and wildlife enhancement, outdoor recreation, flood control, navigation and river regulation and control.

While the Bureau of Reclamation has as its primary mission the conservation and management of natural resources, the mission of the Job Corps is to prepare disadvantaged young people better for the responsibilities of citizenship and to increase their employability through a program of education, work training and experience, and social skills development. The Job Corps facilities under the Bureau of Reclamation are funded from Department of Labor appropriations, which are transferred to the Department of Interior, and Job Corps Centers are administered jointly by these two agencies. In this connection, while the heads of other Operating Offices in Region 4 report to the Regional Director, the Directors of the two Job Corps Centers report to the Department of Labor, when appropriate and when required, as well as to the Regional Director.

The record reflects further that, in general, the job classifications and functions of other employees of Region 4 are significantly different from those of the employees of the Job Corps Centers. Region 4 is staffed principally by employees such as administrators, accountants, engineers,

geologists, economists, electricians, and construction workers; while the Job Corps Centers employ principally guidance counselors, teachers, and training instructors. Region 4 of the Bureau of Reclamation is concerned principally with the day-to-day operations of dams, irrigation and hydro-electric power generation and transmission works, and other Bureau of Reclamation installations; while Job Corps Centers are concerned with classroom, dormitory, and workshop training situations.

The record shows also that while personnel practices are uniform throughout Region 4 and that the central personnel office at the Regional headquarters serves the Job Corps Centers and all the other operating offices of Region 4, in such matters as recruiting, the two Job Corps Centers have only a limited relationship with other facilities of Region 4 or with each other. The record indicates also that the competitive area for promotion through GS-5 and for reductions-in-force is limited to a Job Corps Center. At the time the two Job Corps Centers were established some administrative personnel were recruited from other organizational elements of the Bureau of Reclamation. Since that time there has been no interchange of personnel between the two Job Corps Centers and other facilities of Region 4; nor has there been interchange between the two Job Corps Centers involved herein. 3/

The record shows that the claimed unit at the Weber Basin Job Corps Center is located at Military Springs, seven miles south of Ogden, Utah, approximately 35 miles from the Regional Office in Salt Lake City. The other Job Corps Center in Region 4, the Collbran Job Corps Center in Colorado, is located some 360 miles from the Weber Basin Job Corps Center. As noted above, in addition to the geographic separation of the two Centers, the record reveals that for each of the Job Corps Centers the area of consideration for promotions through GS-5, and for reductions-in-force, is limited to the installation; there has been no interchange between the two Centers; and there is a separate administrative head for each of the Centers who reports directly to the Regional Office and to the Department of Labor.

Based on the foregoing, I find that the petitioned for unit of employees of the Weber Basin Job Corps Civilian Conservation Center is appropriate for the purpose of exclusive recognition. In this connection, the evidence establishes that the missions of the Job Corps and of the Bureau of Reclamation are essentially different; that employees of the Job Corps Centers and of the Bureau of Reclamation differ in their job classifications and job functions; that the Centers are supervised separately and are responsible to the Department of Labor as well as the Bureau of

3/ The few transfers between the two Job Corps Centers have involved only the top managerial officers of the Centers.

Reclamation; and that there has been no interchange between Job Corps Centers and other Region 4 operating offices. 4/ Moreover, a unit limited to the employees of the Weber Basin Civilian Conservation Job Corps Center is appropriate in that the record reveals that the other Job Corps Center in Region 4, the Collbran Job Corps Civilian Conservation Center, is located some 360 miles from Weber Basin; there has been no interchange of employees between the two Centers; each Center is under different immediate supervision; and the Centers report independently to the Regional Office of Region 4 and to the Department of Labor. Under these circumstances, I find the employees of the Weber Basin Job Corps Civilian Conservation Center share a clear and identifiable community of interest separate and distinct from other employees of Region 4 and that such a unit of employees will promote effective dealings and efficiency of agency operations. Accordingly, I shall direct an election in the unit found appropriate.

Eligibility Issues

The record discloses also that there are eligibility issues with respect to certain employee classifications in the unit found appropriate.

Training Instructor (Social Skills)

The parties take no position on the eligibility of employees classified as Training Instructor (Social Skills). The record shows that these Training Instructors are assisted by Group Leaders who report to the Training Instructors for purposes of timekeeping and "leave." The record reveals that the Training Instructors do not have authority to hire, discharge, promote, direct, assign, or evaluate assigned Group Leaders or make effective recommendations in this regard. In these circumstances, I find that employees in the classification, Training Instructor (Social Skills), are not supervisors within the meaning of the Order and should be included in the unit found appropriate. 5/

Group Leader

The parties agree, and the record supports their contention, that the Group Leaders are nonsupervisory employees. Accordingly, Group Leaders will be included in the unit found appropriate.

4/ Cf. United States Department of Agriculture, Forest Service, Schenck Civilian Conservation Center, North Carolina, A/SLMR No. 116; United States Department of Agriculture, Black Hills National Forest, A/SLMR No. 58

5/ Moreover, the record indicates that any supervisory authority which Training Instructors (Social Skills) may have is limited in each instance to one employee. See United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, A/SLMR No. 120

Corpsmen Supervisor, Corpsmen Assistant Supervisor

The parties agree and the record, including job descriptions for these employee classifications, reflects that these employees are supervisors within the meaning of the Order. Accordingly, employees in these classifications will be excluded from appropriate unit.

Principal-Teacher

The parties contend this employee is a supervisor. The record, including the job description for this employee classification, reflects that he is a supervisor and should be excluded from the unit found appropriate.

Guidance Counselor, General Supply Assistant

While the parties contend that employees in these classifications are supervisors, there is insufficient evidence as to their duties and responsibilities. Therefore, I shall make no finding on the supervisory status of employees in these classifications.

Temporary Employees

The AFGE would include in its claimed unit some five temporary employees. With the exception of one Wage Board electrician, there is no evidence in the record regarding the expectancy of continued employment of employees classified as temporary. In these circumstances, I make no finding as to their eligibility for inclusion in the unit found appropriate. 6/

Professional Employees - Teachers, Guidance Counselors

The parties agree that teachers and guidance counselors in the GS-1710 classification series are professional employees. In my view, the evidence supports the parties' stipulation that teachers and guidance counselors employed at the Weber Basin Job Corps Civilian Conservation Center meet the criteria for professional employees set forth in Department of Interior, Bureau of Land Management, Riverside District and Land Office, A/SLMR No. 170. 7/

6/ The record reveals that the electrician is employed as a replacement for a regular employee who is on leave due to a disability resulting from a work-related accident, and his employment will terminate upon the recovery and return to work of the regular employee. Because the evidence shows that this temporary employee has no reasonable expectancy of continued employment, I find he should be excluded from the unit found appropriate.

7/ Cf. also Department of Interior, Bureau of Indian Affairs, Navajo Area, Gallup, New Mexico, A/SLMR No. 99, which pertained to employees in this job classification series. However, it should be noted that, as indicated above, no finding is made herein as to whether guidance counselors are supervisors within the meaning of the Order.

Based on the foregoing, I find 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 Wage Board and General Schedule employees of the Weber Basin Job Corps Civilian Conservation Center at Military Springs, Ogden, Utah, including employees classified as Training Instructor (Social Skills) and Group Leaders, excluding all employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

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

Voting Group (a): All professional employees of the Weber Basin Job Corps Civilian Conservation Center, excluding all nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

Voting Group (b): All Wage Board and General Schedule employees of the Weber Basin Job Corps Civilian Conservation Center, excluding all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

The employees in the nonprofessional voting group (b) will be polled whether or not they desire to be represented by the AFGE.

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 by the AFGE. 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 nonprofessionals, the ballots of voting group (b) 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 AFGE 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, as amended:

> All professional and nonprofessional Wage Board and General Schedule employees of the Weber Basin Job Corps Civilian Conservation Center at Military Springs, Ogden, Utah, including employees classified as Training Instructor (Social Skills) and Group Leader, excluding all employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

2. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find that the following two groups of employees will constitute separate units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order, as amended:

> (a) All Wage Board and General Schedule employees of the Weber Basin Job Corps Civilian Conservation Center, excluding all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.
>
> (b) All professional employees of the Weber Basin Job Corps Civilian Conservation Center, excluding all nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause, since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, AFL-CIO, Local 3284.

Dated, Washington, D. C.
September 25, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

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

DEPARTMENT OF AGRICULTURE,
FARMERS HOME ADMINISTRATION,
NASHVILLE, TENNESSEE
A/SLMR No. 205

This case involved a representation petition filed by the National Federation of Federal Employees, Local 97, seeking a unit of all non-supervisory professional and nonprofessional employees of the Farmers Home Administration employed in the State of Tennessee. The parties were in agreement as to the appropriateness of the unit sought. In accordance with the parties' position, the Assistant Secretary found that the petitioned for unit was appropriate for the purpose of exclusive recognition. In this regard, he noted there is substantial state-wide administrative and operational control exercised by the State Director. Also, there are no variations in the qualifications for employment or the work to be performed in the respective job classifications throughout the State, the employees throughout the State of Tennessee are governed by the same state-wide personnel and labor relations policies, and transfers are effected throughout the State by the State Director's Office.

With respect to the eligibility questions raised in this matter, the Assistant Secretary concluded that County Supervisors should be excluded from the unit found appropriate despite the fact that at the time of the hearing 24 of the 69 County Supervisors had only one subordinate. This determination was based on evidence of substantial fluidity in the staffing pattern in the Activity's county offices precipitated by employee transfers, opening of new offices, and vacancies not yet filled resulting from resignations, retirements, and separations. Moreover, the evidence revealed that all except two of the county offices had authorized staffing patterns in excess of one subordinate. Under these circumstances and considering the job functions and responsibilities of the County Supervisor, the Assistant Secretary found that, with certain exceptions, County Supervisors were supervisors within the meaning of the Order. The Assistant Secretary noted that where the evidence established that based on past history or an authorized staffing pattern of one subordinate a County Supervisor did not have a reasonable expectancy of having more than one subordinate, he would not constitute a supervisor within the meaning of the Order.

The Assistant Secretary found that Assistant County Supervisors, classified as Agriculture Management Specialists, GS-475 Series, were not professionals and should be included in the claimed unit with other nonprofessional employees. Although acknowledging that the job descriptions of the Assistant County Supervisors met some, if not most, of the criteria set out in the definition of professional employees in a recent decision, the Assistant Secretary noted as a determining factor that the evidence revealed that the majority of the work of the employees in question is predominately routine in nature and requires limited discretion. The Assistant Secretary made additional eligibility determinations with respect to Community Program Specialists and Rural Housing Program Specialists, Construction Inspectors, a temporary County Office Clerk, Farmer Program Specialists, an architect, civil engineers, and a Special Projects Representative.

A/SLMR No. 205

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF AGRICULTURE,
FARMERS HOME ADMINISTRATION,
NASHVILLE, TENNESSEE

Activity

and Case No. 41-2713 (RO 25)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 97

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 Howard L. Marsh. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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

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

2. The Petitioner, National Federation of Federal Employees, Local 97, herein called NFFE, seeks an election in a unit of all professional and nonprofessional employees of the Farmers Home Administration, herein called FHA, in the State of Tennessee, but excluding all management officials, supervisors, employees engaged in Federal personnel work in other than a purely clerical capacity, and guards as defined in the Order.

The FHA is a supervised credit agency for rural communities and rural individuals who are unable to obtain credit from local sources. The Headquarters Office for the State of Tennessee is located in Nashville, and is headed by a State Director. This Office is comprised of four divisions: Rural Housing, Farmer Programs, Community Programs, and Special Projects. The field operations in the State of Tennessee are divided into 10 districts, each headed by a District Supervisor. Under the 10 districts are 69 county offices each of which is directed by a County Supervisor. The record reveals that there are 95 counties in the State. Thus, some County Supervisors are responsible for more than one county.

I find that the claimed state-wide unit is appropriate for the purpose of exclusive recognition. In this connection, the evidence shows that there is substantial state-wide administrative and operational control exercised by the State Director. Further, there are no variations in the qualifications for employment or the work to be performed in the respective job classifications throughout the State of Tennessee and the employees throughout the State are governed by the same state-wide personnel and labor relations policies. Moreover, testimony revealed that transfers are effected throughout the State by the State Director's Office. Under these circumstances, I find that the employees in the claimed unit share a clear and identifiable community of interest and that such a unit would promote effective dealings and efficiency of agency operations.

Although the parties were in agreement as to the appropriate unit, several eligibility questions were presented.

County Supervisors

There are 68 County Supervisors and 1 Acting County Supervisor in Tennessee. They are responsible for the management and direction of work in the county offices. In this regard, they carry out diversified agriculture and rural assistance activities, which include the approving, processing, and servicing of various types of loans to both individuals and groups. In the exercise of this responsibility, they may delegate prescribed loan approval authority to Assistant County Supervisors. County Supervisors conduct monthly meetings with their staffs for the purpose of planning work schedules for the following month and of resolving any conflict which may have developed with regard to case handling. They independently evaluate the performance of employees in their respective offices, and they certify as to the acceptable level of competence of their employees for purposes of within-grade increases. The parties stipulated that the County Supervisors approve leave and vacation schedules, assign and direct the staff under them, and effectively recommend promotions, the continued employment of probationary employees or their termination, and any disciplinary action to be taken. Further, they have the responsibility for handling the preliminary stages of employee grievances. In view of the fact that the District Supervisors visit the individual county offices on an average of once a month and that the State Director visits once a year, it is clear that the County Supervisors are subject to minimal immediate supervision.

At the time of the hearing in this case, 24 of the 69 County Supervisors in the State of Tennessee had only one subordinate in their respective offices. However, the evidence clearly establishes that in most cases this is not a static condition. Thus, the record reveals that in 67 of the 69 county offices, the authorized staffing pattern provides for more than one subordinate. Further, there is, in fact, substantial fluidity in the actual staffing of the county offices. For example, within the past year, four or five transfers from one county office to another had the effect of changing the one-subordinate status of certain of the county offices. Moreover, at least five new county offices were opened within the previous two years. The record reveals also that recent retirements and separations have resulted in certain county offices, which previously contained more than one subordinate, being reduced to a single subordinate. To add further to this fluid situation, the 13 Construction Inspectors in the State of Tennessee, who are stationed in particular county offices, may be required to work in two different counties and, therefore, at various times are subject to the supervision of different County Supervisors based on the location of the county in which they happen to be working at a particular time. Finally, testimony revealed that when additional administrative funds are made available or when personnel ceilings are relaxed, the staffs of certain one-subordinate offices will be increased.

Based on the above-noted job functions and responsibilities of the County Supervisors which reflect clearly indicia of supervisory authority and noting the demonstrated fluidity of the county work-force which results in certain County Supervisors having one subordinate at certain times and additional subordinates at other times, 1/ I find that with the exception of those County Supervisors discussed below at footnote 2, the Activity's County Supervisors are supervisors within the meaning of Section 2(c) of the Order and should be excluded from the unit found appropriate. 2/

1/ Compare United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, A/SLMR No. 120.

2/ The record reveals that the County Supervisors in the counties of Mountain City and Newport have no reasonable expectancy of supervising more than one subordinate. In these circumstances, I find that these two County Supervisors are not supervisors within the meaning of the Order and shall include them in the claimed unit. See United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, cited above. To the extent that it is inconsistent with the decision in the subject case, District of New Jersey, Delaware and Maryland, Farmers Home Administration, Department of Agriculture, A/SLMR No. 50, is overruled.
As to the remaining 22 county offices which currently have one subordinate, in my view, the circumstances described above warrant the conclusion that the County Supervisors in such offices have a reasonable expectancy of supervising more than one subordinate where there is evidence that in the past these offices have, in fact, been staffed by more than one subordinate. However, where there is evidence that despite a staffing pattern providing for more than one subordinate the positions have at no time been filled, the County Supervisor in such office would not be viewed as a supervisor within the meaning of the Order.

Assistant County Supervisors

An issue was raised as to whether 40 of the 48 Assistant County Supervisors in Tennessee should be classified as professional employees within the meaning of the Order. 3/ At the commencement of their employment, the Assistant County Supervisors are given a formal six-month training period. The 40 Assistant County Supervisors in question (together with District Supervisors and County Supervisors) are in the Agriculture Management Series, GS-475, and are designated as Agriculture Management Specialists. All have college degrees in some phase of agriculture. The parties assert that Assistant County Supervisors are professional employees within the meaning of the Order. 4/ In support of its position, the Activity contends that the work of an Agriculture Management Specialist is primarily intellectual and varied in character as distinguished from being routine or physical; involves the consistent exercise of discretion and independent judgment; is not standardized; and requires knowledge of an advanced type in Agriculture Science obtained from a university or college as opposed to a general academic education. Further, it is asserted that the job classification is classified as "professional" by the U. S. Civil Service Commission.

In a recent decision, I had occasion to define a professional employee within the meaning of the Order. 5/ It appears that based on the job descriptions of the employees in question, they would meet most, if not all, of the specific criteria set forth in the definition. 6/

3/ The other eight Assistant County Supervisors are classified in the Loan Specialist Series, GS-1165. The parties agree that the Assistant County Supervisors in the GS-1165 Series are nonprofessional employees. As the record supports the parties' stipulation in this regard, I find that the Assistant County Supervisors, Loan Specialist Series GS-1165, are nonprofessional employees and should be included in the appropriate unit with other nonprofessional employees.

4/ There was no contention that these employees are supervisors.

5/ Department of Interior, Bureau of Land Management, Riverside District and Land Office, A/SLMR No. 170.

6/ The definition provided that a professional employee was one who was engaged in the performance of work: (1) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from knowledge acquired by a general academic education, or from an apprenticeship, or from training in the performance of routine mental, manual, or physical processes; (2) requiring the consistent exercise of discretion and judgment in its performance; (3) which is predominately intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work); and (4) which is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

However, in determining whether an employee is a professional within the meaning of the Order, it must be demonstrated that beyond his job description and educational background the employee involved is engaged in the performance of work which meets the prescribed criteria. In the instant case, the record shows that the majority of the work performed in the county offices is concerned with loan programs and, in particular, the rural housing programs. 7/ Such loans are processed under the direction of the County Supervisor and the Assistant County Supervisor, both of whom are Agriculture Management Specialists, GS-475 Series. Applicants for a loan are interviewed either by the County Supervisor, Assistant County Supervisor, or by a clerk. After an application has been received, the County Supervisor, Assistant County Supervisor, or a clerk obtains information over the telephone regarding the applicant and facts obtained are supplied to a County Committee, which certifies the eligibility of the loan applicant. After an applicant has been found to be eligible for a loan, the County Supervisor or Assistant County Supervisor prepares necessary papers, most of which are standard forms, in order for the applicant to receive a loan. Subsequent to the granting of a loan, the County Supervisor, Assistant County Supervisor, or County Office Clerk keeps a record of all money that is spent. The record reveals that knowledge of an advanced type acquired by a prolonged course of specialized instruction in agriculture is not utilized in the processing of rural housing loans and that a general college background is sufficient to enable an individual to perform such a job function. Thus, it appears that a majority of the work actually performed by Assistant County Supervisors is predominately routine in nature and requires limited discretion.

Under these circumstances, I find that Assistant County Supervisors in the GS-475 Series are not professional employees within the meaning of the Order, 8/ and that the employees in this classification should be included in the unit found appropriate with the other nonprofessional employees. 9/

7/ There was testimony that 90 percent of the loans made in one county were rural housing loans and that for the previous year the FHA had appropriated $3.5 million for farm ownership loans and approximately $50 million for rural housing loans.

8/ In reaching this result, it should be noted that in deciding questions of professional status the education or knowledge required for a particular job will be deemed relevant rather than the education or knowledge possessed by the individual.

9/ With regard to the fact that the U. S. Civil Service Commission classifies the Agriculture Management Series, GS-475, as "professional," I have previously found that such a determination, whether made by the U. S. Civil Service Commission or by an agency, will not be determinative for labor relations purposes under the provisions of Executive Order 11491, as amended. See Department of Interior, Bureau of Land Management, Riverside District and Land Office, cited above.

Additional Eligibility Findings

The parties are in agreement that two Community Program Specialists and three Rural Housing Program Specialists, all of whom work in the State Office, are not professionals within the meaning of the Order. As there is no evidence in the record that the parties' stipulation was improper, and noting that employees in these classifications are not required to have a specialized college degree, I find that the employees in these two classifications are not professionals within the meaning of the Order.

The record reveals that there are 13 Construction Inspectors, hired on "temporary" appointments who, as noted above, are assigned to different county offices in Tennessee. They work under the supervision of the particular County Supervisor in the area in which they are working. Construction Inspectors make housing inspections, assist borrowers with plans and specifications, and check construction to see that it meets minimum standards. The length of their appointments ranges from three to six months, and the record indicates that most of them are reappointed on a continuing basis. The parties agreed that these employees should be included in the unit. As the record reveals that Construction Inspectors have a reasonable expectancy of future employment, I find that they should be included in the claimed unit.

There is one temporary clerk employed in one county office. The record reveals that this employee performs the same work and has the same working conditions as other county office clerks. The parties agreed that this employee should be included in the unit. Noting that the employee in this classification was hired for a one-year term with the possibility that she may become a permanent employee, I find that the temporary clerk should be included in the claimed unit. 10/

The parties stipulated that two Farmer Program Specialists, an architect and two civil engineers, all of whom work out of the State Office, are professional employees within the meaning of the Order. The record shows these employees are required to have college degrees in their specialized areas and that their education is utilized on a continuing basis in the performance of their work which is predominately intellectual and varied in character. Under the circumstances, I find these employees to be professionals within the meaning of the Order. 11/

10/ The record reveals that there are 7 clericals in the State Office and 102 clericals in the county offices. These figures include 18 permanent part-time clerks who work from 36 to 39 hours per week. In agreement with the parties, I find that all of the clericals should be included in the claimed unit.

11/ Cf. Department of Interior, Bureau of Land Management, Riverside District and Land Office, cited above.

There is one Special Projects Representative employed in the State Office. The parties would exclude this employee on the basis that he is a management official within the meaning of the Order. The Special Projects Representative has the responsibility for conducting program reviews in each district. He represents the State Director on occasion, and has headed some community action meetings. Further, the record reveals that he, along with Division Chiefs, attends policy-making meetings called by the State Director, and that he assists in setting policy for the Activity. Based on the foregoing, and noting the employee's active participation in the formulation of Activity policy, I find that the Special Projects Representative is a management official within the meaning of the Order. 12/

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 professional and nonprofessional employees of the Department of Agriculture, Farmers Home Administration, employed in the State of Tennessee, excluding all employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

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

Voting Group (a): All professional employees of the Department of Agriculture, Farmers Home Administration, employed in the State of Tennessee, excluding all nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

Voting Group (b): All nonprofessional employees of the Department of Agriculture, Farmers Home Administration, employed in the State of Tennessee, excluding all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

12/ Cf. Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135.

The employees in the nonprofessional voting group (b) will be polled whether or not they desire to be represented by the NFFE.

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 by the NFFE. 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 nonprofessionals, 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 NFFE 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, as amended:

> All professional and nonprofessional employees of the Department of Agriculture, Farmers Home Administration, employed in the State of Tennessee, excluding all employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

2. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find that the following two groups of employees will constitute separate units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order, as amended:

> (a) All nonprofessional employees of the Department of Agriculture, Farmers Home Administration, employed in the State of Tennessee, excluding all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

(b) All professional employees of the Department of Agriculture, Farmers Home Administration, employed in the State of Tennessee, excluding all non-professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the National Federation of Federal Employees, Local 97.

Dated, Washington, D. C.
September 25, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

DEPARTMENT OF THE ARMY,
U.S. ARMY ENGINEER DISTRICT,
MOBILE, ALABAMA
A/SLMR No. 206

This case arose as a result of representation petitions filed by the National Federation of Federal Employees, Locals 561 and 131, (NFFE), and the American Federation of Government Employees, Local 2257, AFL-CIO, (AFGE). The National Maritime Union of America, AFL-CIO, (NMU), and AFGE Locals 2257 and 2421, intervened in the petitions filed by the NFFE. NFFE Local 561 intervened in the petitions filed by the AFGE.

NFFE Locals 561 and 131 requested a unit of all nonsupervisory, nonprofessional employees of the U.S. Army Engineer District, Mobile, Alabama, district-wide. In addition, NFFE Local 561 requested a unit of all nonsupervisory, nonprofessional floating plant employees and a unit of all nonsupervisory, nonprofessional employees of the Recreation Resource Management Branch of the Mobile District. The AFGE requested a unit of all nonsupervisory, nonprofessional employees of the Resource Manager's Office, Lake Seminole, Florida and Georgia and a unit of all nonsupervisory, nonprofessional employees of the Hydro-Power Branch of the Mobile District.

The Activity took the position that multiple units within the Mobile District, as well as a district-wide unit, would be appropriate for the purpose of exclusive recognition.

The Assistant Secretary concluded that NFFE Local 561's petition, as amended, covering the Mobile District's floating plant employees, was not filed timely within the 90-60 day open period prior to the expiration date of a negotiated agreement between the Activity and the NMU covering such employees. Accordingly, the Assistant Secretary dismissed the petition. The Assistant Secretary also found that AFGE Locals 2257 and 2421's prior negotiated agreements posed no bar to the NFFE's district-wide petition in that they had expired and were under renegotiation at the time the district-wide petition was filed. With respect to an alleged certification bar as to the district-wide petition, the Assistant Secretary found that the AFGE had voluntarily waived its certification bar with respect to the Millers Ferry Powerhouse unit when it filed a petition for a unit encompassing all field offices of the Hydro-Power Branch (which included employees of the Millers Ferry Powerhouse).

Under all the circumstances, the Assistant Secretary found that the unit petitioned for by NFFE Locals 561 and 131 which covered all nonsupervisory, nonprofessional employees in the Mobile District was appropriate

for the purpose of exclusive recognition inasmuch as there was substantial integration of operations within the Mobile District; the supervisory authority and locus of negotiation authority was centered in the Office of the District Engineer; a central Personnel Office administered uniform policies and programs for the entire District; the area of consideration for competitive job bidding and reductions-in-force was district-wide; and there was evidence of transfers district-wide.

The Assistant Secretary also found that a unit of all nonsupervisory, nonprofessional employees of the Recreation Resource Management Branch, as requested by NFFE Local 561, and a unit of all nonsupervisory, nonprofessional employees of the Resource Manager's Office, Lake Seminole, Florida and Georgia, as requested by AFGE Local 2257, were inappropriate as such units would exclude other employees within the District who had a clear and identifiable community of interest with employees in these petitioned for units. Accordingly, the Assistant Secretary ordered that these petitions be dismissed.

Additionally, the Assistant Secretary found that the unit of all nonsupervisory employees of the Hydro-Power Branch field offices, as petitioned for by AFGE Local 2257, was an appropriate unit for the purpose of exclusive recognition in that the majority of the job classifications found in this unit were unique; skilled powerhouse employees had their own extensive four-year training program; and transfers of powerhouse employees had been restricted largely to within-branch personnel actions. Accordingly, he directed that the employees in the claimed unit be given the opportunity to vote for the labor organization seeking to represent them separately.

Further, in view of his policy as set forth in Federal Aviation Administration, Department of Transportation, A/SLMR No. 122, that employees in exclusively recognized units where the evidence establishes the existence of a collective-bargaining history should have the opportunity to vote in self-determination elections, the Assistant Secretary directed that employees in the following bargaining units be given the opportunity to vote in self-determination elections: (a) employees of the Mobile District's floating plants formerly covered by a recently expired collective-bargaining agreement between the NMU and the Activity; (b) employees of the Jim Woodruff and Columbia Locks formerly covered by a recently expired collective-bargaining agreement between AFGE Local 2257 and the Activity; and (c) employees of the Walter F. George-Columbia Lake formerly covered by a recently expired collective-bargaining agreement between AFGE Local 2421 and the Activity.

Thus, the Assistant Secretary directed elections in the district-wide unit and in several units within the District. He noted that if a majority of the employees voting in any of the self-determination elections did not select the labor organization seeking to represent their group separately or the incumbent exclusive representative, their votes would be pooled with the ballots of the employees voting in the district-wide election.

A/SLMR No. 206

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,
U.S. ARMY ENGINEER DISTRICT,
MOBILE, ALABAMA 1/

Activity

and Case No. 40-3045(RO)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 561

Petitioner

and

NATIONAL MARITIME UNION OF AMERICA,
AFL-CIO 2/

Intervenor

DEPARTMENT OF THE ARMY,
U.S. ARMY ENGINEER DISTRICT,
MOBILE, ALABAMA

Activity

and Case No. 40-3064(RO)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 561

Petitioner

DEPARTMENT OF THE ARMY,
U.S. ARMY ENGINEER DISTRICT,
MOBILE, ALABAMA

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.

and

Case No. 40-3137(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2257, AFL-CIO 3/

Petitioner

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 561

Intervenor

DEPARTMENT OF THE ARMY,
U.S. ARMY ENGINEER DISTRICT,
MOBILE, ALABAMA

Activity

and

Case No. 40-3492(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2257, AFL-CIO

Petitioner

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 561

Intervenor

DEPARTMENT OF THE ARMY,
U.S. ARMY ENGINEER DISTRICT,
MOBILE, ALABAMA

Activity

and

Case No. 40-3503(RO)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCALS 561 AND 131

Joint Petitioners

3/ The name of the Petitioner appears as amended at the hearing.

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCALS 2257 AND 2421,
AFL-CIO

Joint Intervenors

and

NATIONAL MARITIME UNION OF AMERICA,
AFL-CIO

Intervenor

DECISION, ORDER AND DIRECTION OF ELECTIONS

Upon petitions duly filed under Section 6 of Executive Order 11491, a consolidated 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 these cases, including briefs filed by the National Federation of Federal Employees, Locals 561 and 131, herein called NFFE, the American Federation of Government Employees, Locals 2257 and 2421, AFL-CIO, herein called AFGE, and the National Maritime Union of North America, AFL-CIO, herein called NMU, the Assistant Secretary finds:

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

2. In Case No. 40-3045(RO) Petitioner, NFFE Local 561, seeks an election in a unit of all floating plant employees under the supervision of the U.S. Army Engineer District, Mobile, Alabama, excluding all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Executive Order. 4/ The NMU, which intervened in this case, asserts that the NFFE's petition was barred by a negotiated agreement.

In Case No. 40-3064(RO) Petitioner, NFFE Local 561 seeks an election in a unit of all employees under the supervision of the Recreation Resource Management Branch of the U.S. Army Engineer District, Mobile, Alabama, excluding all professional employees, employees engaged in Federal

4/ The claimed unit appears as amended.

personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Executive Order. 5/

In Case No. 40-3137(RO) Petitioner, AFGE Local 2257 seeks an election in a unit of all employees of the Resource Manager's Office, Corps of Engineers, Lake Seminole, Florida and Georgia, excluding all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in Executive Order 11491. 6/

In Case No. 40-3492(RO) Petitioner, AFGE Local 2257 seeks an election in a unit of all employees of the Hydro-Power Branch field offices under the Operations Division of the U.S. Army Engineer District, Mobile, excluding all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in Executive Order 11491. 7/

In Case No. 40-3503(RO) Joint Petitioners, NFFE Locals 561 and 131 seek an election in a unit of all employees of the U.S. Army Engineer District, Mobile, Alabama, district-wide, excluding all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in Executive Order 11491. 8/ AFGE Locals 2257 and 2421 allege

5/ The claimed unit appears as amended at the hearing. In effect, the amendment to the claimed unit added eligible employees at the Recreation Resource Management Branch Headquarters at Mobile, Alabama, and field offices at Walter F. George - Columbia Lake, Lake Sidney Lanier, Lake Seminole, Allatoona Lake, Okatibbee Lake, Black-Warrior and Tombigbee Lakes. The original petitioned for unit was limited to the Alabama River Reservoirs Managers Office of the Recreation Resource Management Branch. The claimed unit as amended was challenged by the AFGE on the basis that the amended petition substantially enlarged the original unit sought, and required a new showing of interest and a new posting of the notice of petition. In view of my disposition herein, I find it unnecessary to pass upon the AFGE's challenge in this regard.

6/ The claimed unit appears as amended at the hearing.

7/ The claimed unit appears as amended at the hearing.

8/ The claimed unit appears as amended at the hearing. With respect to AFGE Locals' 2257 and 2421 contention that they were not served with the attachments to the NFFE's petition in Case No. 40-3503(RO) and, therefore, such petition should be dismissed, these Locals admittedly received the petition and participated fully in the hearing in this matter.

(Continued)

agreement, certification and hearing bars with regard to the NFFE's district-wide petition.

The Activity takes the position that either multiple units within the Mobile District, or a district-wide unit, would be appropriate for the purpose of exclusive recognition.

ORGANIZATIONAL STRUCTURE OF THE U.S. ARMY ENGINEER DISTRICT, MOBILE

The mission of the U.S. Army Engineer District, Mobile, is to construct, operate and maintain public works projects and supervise all river and harbor flood control within a geographical area under the District's jurisdiction. The District also is in charge of real estate transactions and the design and construction of buildings for the Army, Air Force and Postal Service within a specific region.

The District Office, under the overall supervision of the District Engineer, is subdivided into the Advisory and Administrative Staff 9/ and the Technical Staff. The Technical Staff is subdivided into five divisions: the Real Estate Division, which acquires and disposes of land for civilian and military use; the Engineering Division, which is responsible for the conception of projects and the general planning, specifications and determination of the economic feasibility of these projects; the Supply Division, which is concerned with the procurement and storage of items that are needed by other divisions within the District; the Construction Division, which supervises and administers construction contracts; and the Operations Division, which is responsible for the operation and maintenance of permanently installed civil works. Under the administrative supervision of the

8/ Under these circumstances and noting that such procedural objections should have been raised with the appropriate Area Administrator prior to the commencement of the hearing, I reject the AFGE Locals' above-noted contention. As to AFGE Local 3054's contention that it was not served with a copy of the petition in Case No. 40-3503(RO) although it was the exclusive representative of the employees of the Core Drill Section of the Engineering Division within the Mobile District, it appears that the Local's Secretary-Treasurer, as well as other members of the Local, were aware of the petition which was posted throughout the Activity and that the Local failed to intervene timely or raise objections in this connection prior to the hearing in this matter. Under these circumstances, I do not consider the fact that Local 3054 did not receive a copy of the petition to warrant dismissal.

9/ The Advisory and Administrative Staff consists of approximately 186 employees in eight offices: the Comptroller; the Counsel; the Safety Office; the Office of Emergency Planning and Security; the Public Affairs Office; the Automatic Data Processing Center; the Office of Administrative Services; and the Personnel Office.

Operations Division, the Hydro-Power Branch manages and directs the activities of all power plants; the Recreation Resource Management Branch operates and maintains lake projects and the facilities provided for public recreational use; and the Project Operations Branch supervises the operation and maintenance of the locks and dams of the Tuscaloosa, Mobile, and Panama City Area Offices. The floating plants, which are under the jurisdiction of the Area Offices, consist, in part, of dredges and snag boats, which remove all obstructions to navigation on the rivers within the District.

ALLEGED PROCEDURAL BARS

As noted above, in Case No. 40-3045(RO), NFFE Local 561 seeks an election in a unit consisting of all nonsupervisory, nonprofessional floating plant employees under the supervision of the U.S. Army Engineer District, Mobile, Alabama. The petition, as amended, would include the employees of the Tuscaloosa, Mobile, and Panama City floating plants. The evidence establishes that the NMU has been the exclusive representative of these employees since December 5, 1963. Its most recent negotiated agreement with the Activity covering this unit had an expiration date of July 15, 1971. At the commencement of the hearing, the NMU moved to dismiss the NFFE's petition in this case on the ground that it was filed untimely under Section 202.3(c) of the Assistant Secretary's Regulations. 10/

The record reveals that while the NFFE's initial petition in Case No. 40-3045(RO) which sought nonsupervisory, nonprofessional employees of the Activity's floating plants at Mobile, Alabama, and Panama City, Florida, was filed timely, its subsequent amendment of the petition adding to the claimed unit similar employees of the Activity's floating plants at Tuscaloosa, Alabama, occurred within the 60-day period preceding the termination date of the existing negotiated agreement between the Activity and the NMU. Under these circumstances, I find that the NFFE's petition, as amended, in Case No. 40-3045(RO) was filed untimely within the meaning of Section 202.3(c) of the Assistant Secretary's Regulations. Accordingly, the NMU's motion in this regard is affirmed and I shall order that the petition in Case No. 40-3045(RO) be dismissed.

AFGE Locals 2257 and 2421 contend that their negotiated agreements with the Activity covering their respective exclusively recognized units within the Mobile District effectively bar the NFFE's petition for a district-wide unit in Case No. 40-3503(RO) which was filed on November 22, 1971. In this connection, the record reveals that AFGE Local 2257 has been the exclusive representative of employees at the Jim Woodruff and Walter F. George Powerhouses and the Jim Woodruff and Columbia Locks since November 12, 1963. Its negotiated agreement with the Activity covering this unit had expired and was under renegotiation at the time the NFFE filed its district-wide petition. The record further establishes that AFGE Local 2421 has been the exclusive representative of employees at the Walter F. George-Colubmia Lake Reservoir since March 31, 1967. Similarly, its negotiated agreement with the Activity covering this unit had expired and was under renegotiation at the time the NFFE's district-wide petition was filed. As it appears that neither of the above units was covered by a negotiated agreement at the time the petition in Case No. 40-3503(RO) was filed, I find that no agreement bar exists as to such petition.

AFGE Local 2257 further contends that its certification of February 22, 1971, as the exclusive representative of all employees of the Millers Ferry Powerhouse effectively bars inclusion of this powerhouse in the district-wide unit petitioned for by NFFE on November 22, 1971. I have stated previously 11/ that the twelve-month certification bar established under Section 202.3(b) of the Assistant Secretary's Regulations 12/ was designed to afford an agency or activity and a certified incumbent labor organization a reasonable period of time in which to initiate and develop their bargaining relationship free of rival claims. However, where, as here, a certified labor organization files a petition during the certification year, encompassing its certified unit, I find that it has evidenced an intent to waive the certification bar period in an attempt to gain exclusive recognition in a broader unit. 13/ Thus, by filing a petition on November 11, 1971 in

10/ Section 202.3(c) states, in pertinent part, "When there is a signed agreement covering a claimed unit, a petition for exclusive recognition or other election petition will not be considered timely if filed during the period within which that agreement is in force or awaiting approval at a higher management level, but not to exceed an agreement period of two (2) years, unless (1) a petition is filed not more than ninety (90) days and not less than sixty (60) days prior to the terminal date of such agreement or two (2) years, whichever is earlier..."

11/ Army and Air Force Exchange Service, Dix-McGuire Consolidated Exchange, Fort Dix, New Jersey, A/SLMR No. 195.

12/ Section 202.3(b) states, in pertinent part, "When there is a recognized or certified exclusive representative of the employees, a petition will not be considered timely if filed within twelve (12) months after the grant of exclusive recognition or certification as the exclusive representative of employees in an appropriate unit..."

13/ Ultimately, in order to obtain an election in the broad petitioned for unit including the previously certified unit, the petitioner would have to indicate a willingness to waive its exclusive recognition status and, in effect, put such status "on the line" at the election. Cf. Department of the Army, U.S. Army Electronics Command, Fort Monmouth, New Jersey, A/SLMR No. 83, footnote 2. Compare also U.S. Department of Defense, DOD Overseas Dependent Schools, A/SLMR No. 110, where I found that an agreement bar may not be waived unilaterally. As distinguished from an agreement bar which, in effect, establishes bilateral obligations, a certification of representative is granted solely to a labor organization. In my view, that organization may, within its own discretion, choose to waive the effect of such certification.

Case No. 40-3492(RO) for a unit of all nonsupervisory employees of the Activity's Hydro-Power Branch field offices which would include the certified unit at Millers Ferry Powerhouse, I find that the AFGE, in effect, waived its certification bar with respect to the Millers Ferry Powerhouse unit. 14/ Under the foregoing circumstances, I reject the AFGE Local 2257's contention regarding the untimeliness of the NFFE's petition in Case No. 40-3503(RO) with respect to the Millers Ferry Powerhouse unit.

APPROPRIATE UNITS FOR THE PURPOSE OF EXCLUSIVE RECOGNITION

The Mobile District employs approximately 1,450 Wage Board and General Schedule employees, of whom 700 are stationed in the District Office in Mobile, Alabama and 750 are assigned to the field. Approximately 300 of the District's employees are professionals, 260 are supervisors and management officials, and 84 are classified as temporary. 15/

Supervisory authority in the Mobile District is centered in the Office of the District Engineer. While the various chiefs of different branches and divisions have limited authority over assignments, annual leave, performance evaluation, and the discipline of their employees, final authority for the administration and operation of the District rests with the District Engineer. Furthermore, although labor relations negotiations may occur at lower management levels, the District Engineer possesses the final authority to approve any negotiated agreements.

The evidence establishes that the development of construction projects within the Mobile District requires a substantial integration of operations and interchange of personnel throughout the divisions and branches of the Technical Staff. Thus, the Engineering Division's Planning and Reports, Survey, Design, and Foundation and Materials Branches complete a cost-benefit analysis and the initial planning of each project. Thereafter, construction is conducted under the supervision of the Construction Division, with technical assistance from the Design Branch of the Engineering Division. The Operations Division's various branches assume jurisdiction over the completed project.

14/ The representation hearing involving the Millers Ferry Powerhouse unit, which occurred more than twelve months prior to the filing of the NFFE's petition in Case No. 40-3503(RO),would not constitute a bar within the meaning of Section 202.3(f) of the Assistant Secretary's Regulations.

15/ With respect to the temporary employees of the Mobile District, the evidence indicates that they are found primarily in the Core Drill Section of the Engineering Division, with only limited numbers scattered throughout the remainder of the District. While their appointments vary from 30 days to one year, the record lacks information regarding the exact nature of their assignments or the likelihood of their being retained after the expiration of their assignments. In these circumstances, I shall not pass upon whether they should be included in or excluded from any unit found appropriate herein.

The record reveals that from 1970 to 1972 there was a substantial number of personnel transfers among divisions and their respective branches, with the exception of the Hydro-Power Branch and the floating plants. Further, employees from outside the Operations Division have exercised bumping rights into that Division. Consideration for competitive job bidding, merit promotions, and reductions-in-force are determined on a district-wide basis.

The record discloses that the District Engineer has delegated authority to the Personnel Office for the administration of a centralized civilian personnel program throughout the Mobile District. Thus, the personnel records of all District employees are kept in the Personnel Office in Mobile and the Personnel Officer has the authority to hire, promote, reassign and discipline all employees and recommend reductions-in-force,if necessary. Only adverse actions necessitate review and approval by the District Engineer. The record reveals further that employee grievances usually are directed to the central Personnel Office and thereafter are referred to the appropriate Area Office for processing.

The Mobile District employs personnel in a wide range of job classifications. The record reveals that many of these job classifications are common to several branches or divisions within the District. Thus, civil engineering technicians, engineering equipment operators, maintenance workers, crane operators, motor vehicle operators, launch operators, laborers, and clerk-typists are among the nonsupervisory, nonprofessional employees in job classifications common to the Operations Division's Recreation Resource Management Branch, as well as other branches of the Operations, Engineering and Construction Divisions.

On the other hand, it appears that such job classifications as power plant senior mechanic, electrician, shift operator, and communications technician are unique to the Hydro-Power Branch of the Operations Division. Further, the skilled powerhouse employees in this Branch undergo an extensive four-year training program operated on a South Atlantic Division-wide basis before they are assigned permanently to the Mobile District. 16/ The record reveals that powerhouse trainees are hired normally at a central location and then assigned to a District powerhouse where they are needed. The evidence establishes further that Wage Board powerhouse employees are paid by job title according to a special "Southeast power rate schedule" for the South Atlantic Division. This payment plan differs from that utilized with respect to the majority of the District's other Wage Board employees whose pay schedules have been established based on comparative wage levels in specified geographical areas. 17/ The evidence also shows that there has

16/ This training consists of an entrance examination, an international correspondence course and technical instruction with periodic oral and written tests.

17/ The Wage Board employees of the floating plants and the locks and dams of the Area Offices of the Operations Division are the only other employees who have a special pay schedule established for their positions. However, this pay schedule, unlike that of the powerhouse employees, lists wage levels by grades, not by job titles.

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been minimal transfer into or out of the Hydro-Power Branch by other District employees within the past two years.

Regarding the floating plants, the record reveals that there are two dredges, two snag boats and three survey boats attached to the Area Office of the Operations Division. A dredge's function is to remove obstructions from the waterways to provide suitable depths in order to enable towboats to pass. Survey boats locate the obstructions and direct the dredge to the area. Employees on dredges work eight-hour shifts and live on-board because of the remoteness of their operation's location. Snag boats, which clear locks and waterways of debris, are in operation eight hours a day, five days a week. While employees have been transferred among the floating plants during the past two years, there appear to have been no transfers into or out of the floating plants operations by other District employees during this period.

With respect to floating plant employees attached to the Tuscaloosa Area Office, the record reveals a significant degree of integration of operations between these employees and the machine shop and boatyard employees located at Tuscaloosa. Thus, from December until April or May of every year, the floating plants of this Area Office undergo repair in its machine shops and boatyard. During this period, the floating plant employees are assigned work in the machine shop under the supervision of the general foreman. The record discloses that approximately 75 percent of the floating plants' deckhands are assigned as helpers in the machine shop and that the levermen who normally operate the cutter on the dredges become welders. Thus, it appears that for almost one-half of every year, floating plant employees work alongside and under the direction of machine shop employees. Moreover, on-site repairs on operating floating plants often constitute a joint operation conducted by a machine shop employee assisted by a floating plant crew.

Based on all of the foregoing circumstances, I find that the nonsupervisory, nonprofessional employees in the Mobile District, as petitioned for by the NFFE in Case No. 40-3503(RO),share a clear and identifiable community of interest and that such a comprehensive unit will promote effective dealings and efficiency of agency operations. Thus, as noted above, the evidence establishes that there is substantial integration of operations within the Mobile District; supervisory authority,as well as the locus of negotiation authority, is centered in the Office of the District Engineer; there is a central Personnel Office which administers uniform policies and programs for the entire District; the area of consideration for competitive job bidding and reductions-in-force is District-wide; and within the District there is evidence of employee transfers. I find, therefore, that the claimed unit in Case No. 40-3503(RO) is appropriate for the purpose of exclusive recognition and, therefore, I shall direct an election in such unit.

Under the foregoing circumstances, and noting particularly the existence of personnel in similar job classifications within the Mobile District outside the claimed units, the evidence of transfer of employees on a District-wide basis (with the exception of those in the Hydro-Power Branch and those

working on floating plants), and the central administration of all District personnel policies and practices, I find that a unit of all nonsupervisory, nonprofessional employees of the Recreation Resource Management Branch, as requested by NFFE Local 561 in Case No. 40-3064(RO), or a unit of all nonsupervisory, nonprofessional employees of the Resource Manager's Office, Lake Seminole, Florida and Georgia as requested by AFGE Local 2257 in Case No. 40-3137(RO), would be inappropriate. In my opinion, the aforementioned units would exclude other similarly situated employees in the District who have a clear and identifiable community of interest. Such fragmented units could not reasonably be expected to promote effective dealings and efficiency of agency operations. Accordingly, I shall dismiss the petitions in Case Nos. 40-3064(RO) and 40-3137(RO).

Additionally, I find that the unit of all nonsupervisory employees of the Hydro-Power Branch field offices as petitioned for by AFGE Local 2257 in Case No. 40-3492(RO) is an appropriate unit for the purpose of exclusive recognition. Thus, a majority of the job classifications found in the powerhouses are unique to these field offices; skilled powerhouse employees have their own extensive four-year training program; and transfers of powerhouse employees have been restricted largely to within-branch personnel actions. Having found that the powerhouse employees petitioned for by the AFGE may, if they so desire, constitute a separate appropriate unit, I shall not make any final determination at this time, but shall first ascertain the desires of the employees by directing an election in the following group:

> Voting Group (a): All employees of the Hydro-Power Branch field offices of the Operations Division, U.S. Army Engineer District, Mobile, Alabama, excluding all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

Further, in view of my finding in Federal Aviation Administration, Department of Transportation, A/SLMR No. 122, that employees in exclusively recognized units in which the evidence establishes the existence of a collective-bargaining history, i.e.-- such units have been covered by negotiated agreements which either still exist or have recently expired -- should have the opportunity to vote in a self-determination election in their existing units, I shall not make any final determinations at this time with respect to the voting groups (b), (c) and (d) described below, but shall first ascertain the desires of the employees in:

> Voting Group (b) (Formerly covered by a recently expired collective-bargaining agreement between the NMU and the Activity):
>
> All marine floating plant non-officer personnel employed by the U.S. Army Engineer District,

Mobile, excluding all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

Voting Group (c) (Formerly covered by a recently expired collective-bargaining agreement between the AFGE Local 2257 and the Activity):

All employees of the Jim Woodruff and Columbia Locks on the Chattahoochee River, excluding all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

Voting Group (d) (Formerly covered by a recently expired collective-bargaining agreement between the AFGE Local 2421 and the Activity):

All employees of the Walter F. George-Columbia Lake, excluding all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

Further, consistent with the above determination in Case No. 40-3503(RO), I find that the following employees in voting group (e) may constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of Executive Order 11491:

Voting Group (e):

All employees of the U.S. Army Engineer District, Mobile, Alabama, district-wide, excluding all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

If a majority of the employees voting in voting group (a) select the labor organization which is seeking to represent them separately (AFGE Local 2257 in Case No. 40-3492(RO)), or if a majority of the employees voting in voting groups (b), (c) or (d) select the incumbent exclusive representative (NMU in voting group (b); AFGE Local 2257 in voting group (c); and AFGE Local 2421 in voting group (d)),they will be taken to have indicated their desire to constitute a separate appropriate unit. In such circumstances,

the Area Administrator supervising the election is instructed to issue a certification of representative to the labor organization seeking to represent the employees separately or to the incumbent exclusive representative. However, if a majority of the employees voting in any or all of voting groups (a), (b), (c) or (d) do not vote for the labor organization which is either seeking to represent them in a separate unit or is the incumbent exclusive representative, the ballots of the employees in these voting groups will be pooled with those of the employees in voting group (e). 18/ In the event that a majority of the valid votes in

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18/ If the votes of voting groups (a), (b), (c), and/or (d) are pooled with the votes of voting group (e), they are to be tallied in the following manner:

In voting group (a) all votes are to be accorded their face value. Thus, any votes for AFGE Local 2257 shall be pooled with the votes for the joint intervenors, AFGE Locals 2257 and 2421, in voting group (e); any votes for NFFE Local 561 shall be pooled with the votes for the joint petitioners NFFE Locals 561 and 131, in voting group (e); and any votes for the NMU shall be pooled with the votes for the NMU in voting group (e).

In voting group (b) all votes are to be accorded their face value. Thus, any votes for the NMU shall be pooled with the votes for the NMU in voting group (e); any votes for NFFE Locals 561 and 131 shall be pooled with the votes for NFFE Locals 561 and 131 in voting group (e); and any votes for AFGE Locals 2257 and 2421 shall be pooled with the votes for AFGE Locals 2257 and 2421 in voting group (e).

In voting group (c) all votes are to be accorded their face value. Thus, any votes for AFGE Local 2257 shall be pooled with the votes for the joint intervenors, AFGE Locals 2257 and 2421 in voting group (e); any votes for NFFE Locals 561 and 131 shall be pooled with those for NFFE Locals 561 and 131 in voting group (e); and any votes for the NMU shall be pooled with the votes for the NMU in voting group (e).

In voting group (d) all votes are to be accorded their face value. Thus, any votes for AFGE Local 2421 shall be pooled with the votes for the joint intervenors, AFGE Locals 2257 and 2421 in voting group (e); any votes for NFFE Locals 561 and 131 shall be pooled with the votes for NFFE Locals 561 and 131 in voting group (e); and any votes for the NMU shall be pooled with the votes for the NMU in voting group (e).

(Continued)

voting group (e), including any votes pooled from voting groups (a), (b), (c) and/or (d), are cast for NFFE Locals 561 and 131, AFGE Locals 2257 and 2421, or the NMU, that labor organization shall be certified as the exclusive representative of employees in voting groups (a), (b), (c) and/or (d) and (e) which, under the circumstances, I find to be an appropriate unit for the purpose of exclusive recognition.

ORDER

IT IS HEREBY ORDERED that the petitions in Case Nos. 40-3045(RO), 40-3064(RO) and 40-3137(RO) be, and they hereby are, dismissed.

DIRECTION OF ELECTIONS

Elections by secret ballot shall be conducted among employees in the voting groups described above, as early as possible, but not later than sixty (60) days from the date below. The appropriate Area Administrator shall supervise the elections, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the voting groups who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

Those eligible in voting group (a) shall vote whether they desire to be represented for the purpose of exclusive recognition by American Federation of Government Employees, Local 2257, AFL-CIO, by National Federation of Federal Employees, Local 561, by National Maritime Union of America, AFL-CIO, or by none; those eligible in voting group (b) shall vote whether they desire to be represented for the purpose of exclusive recognition by National Maritime Union of America, AFL-CIO, by National Federation of Federal Employees, Locals 561 and 131, by American Federation of Government Employees, Locals 2257 and 2421, AFL-CIO, or by none; those eligible in voting group (c) shall vote whether they desire to be represented for the purpose of exclusive recognition by American Federation of Government Employees, Local 2257, AFL-CIO, by National Federation of Federal Employees, Locals 561 and 131, by National Maritime Union of America, AFL-CIO, or by none; those eligible in voting group (d) shall vote whether they desire to be represented for the purpose of exclusive recognition by American Federation of Government Employees, Local 2421, AFL-CIO, by National Federation of Federal Employees, Locals 561 and 131, by National Maritime Union of America, AFL-CIO, or by none; and those eligible in voting group (e) shall vote whether they desire to be represented for the purpose of exclusive recognition by National Federation of Federal Employees, Locals 561 and 131, by American Federation of Government Employees, Locals 2257 and 2421, AFL-CIO, by National Maritime Union of America, AFL-CIO, or by none.

Dated, Washington, D. C.
September 26, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

18/ Additionally, all votes which are cast against representation shall be pooled, where appropriate, with the votes cast against representation in voting group (e).

September 26, 1972

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

ACTION
A/SLMR No. 207

This case which arose as a result of a representation petition filed by the American Federation of Government Employees, AFL-CIO (AFGE), presented the question of whether Foreign Service employees should be excluded from an Activity-wide unit. On October 13, 1971, pursuant to a previous request of the Activity, the Federal Labor Relations Council refused to exempt ACTION Foreign Service employees from the coverage of Executive Order 11491, as amended.

The AFGE requested a unit composed solely of employees classified as General Schedule employees. The Activity agreed that the unit requested was appropriate for the purpose of exclusive recognition. The Activity and the AFGE sought to exclude the Foreign Service employees on the basis that Foreign Service and General Schedule employees are under different personnel systems and, therefore, have different benefits, rights, and working conditions which would present difficult, if not insurmountable, obstacles to the successful negotiation and administration of a collective-bargaining agreement between the parties, and to include them would not promote efficiency of agency operations.

The Assistant Secretary found that a unit limited to General Schedule employees as proposed by the AFGE was not appropriate for the purpose of exclusive recognition. Noting that similar arguments pertaining to the lack of common benefits and control have previously been raised in representation cases involving the eligibility of off-duty military personnel, the Assistant Secretary reemphasized the fact that he considered as a determining factor in ascertaining the community of interest between employees the immediate status of the employee while in the employment relationship and not what ultimate control he might be subject to at other times. He considered as indicia of employee community of interest under the Order the interchange and contact among employees, the similarity of work performed and common supervision. He noted that the lack of common benefits, pay scales, and ultimate control would not, standing alone, be considered dispositive as to community of interest. While considering the existence of variances between the General Schedule employees and the Foreign Service employees in such areas as personnel systems, benefits, rights, pay scales, and certain conditions of employment to be factors in determining "community of interest," he viewed these factors as being offset by the substantial evidence of the close working relationship between the Activity's employees in these two categories. In this regard, he noted that some Foreign Service employees of the Activity work alongside, perform the same job functions, and have essentially the same job classifications and supervision as the General Schedule employees in the petitioned for unit. Accordingly, he directed that the AFGE's petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ACTION

Activity

and Case No. 22-2800 (RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Leo Glunk. 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 parties' briefs, the Assistant Secretary finds:

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

2. The Petitioner, American Federation of Government Employees, AFL-CIO, herein called AFGE, seeks an election in a unit of all of the Activity's professional 1/ and nonprofessional employees, but excluding management officials, supervisors, employees engaged in Federal personnel work in other than a purely clerical capacity, guards and Foreign Service

1/ While the record contains references to professional employees, the record does not set forth sufficient facts with respect to their duties, training, educational background, etc., so as to provide a basis for a finding of fact that employees in particular classifications are professionals. Accordingly, I will make no findings as to which employee classifications herein constitute professional employees within the meaning of the Order.

employees. The Activity, in agreement with the AFGE, asserts that the unit petitioned for by AFGE is appropriate for the purpose of exclusive recognition. 2/

The sole issue presented herein is whether Foreign Service personnel should be included with the General Schedule employees in the claimed unit. 3/ The parties contend that combining in a single unit General Schedule and Foreign Service employees would present difficult, if not insurmountable, obstacles to the successful negotiation and administration of a collective-bargaining agreement between the parties. Further, the parties contend that such a combined unit of employees would not promote efficiency of agency operations.

The Activity was created pursuant to the President's Reorganization Plan No. 1, effective July 1,1971. Under this Plan, volunteer programs such as the Peace Corps, SCORE/ACE, VISTA, Older American Programs, and the Office of Volunteer Action were merged into what now constitutes ACTION. 4/

2/ On December 13, 1971, the Acting Regional Administrator rejected the parties' request for approval of a consent election agreement which would have excluded Foreign Service employees from the claimed unit because, in his view, the eligibility status of Foreign Service employees could best be resolved on the basis of record testimony. Thus, a Notice of Hearing was issued by the Acting Regional Administrator on January 14, 1972, and the hearing was held subsequently on February 16 and 17, 1972.

3/ The record reveals that the Activity, by letter, had requested the Federal Labor Relations Council to recommend that ACTION Foreign Service employees be exempted from the coverage of Executive Order 11491, as amended, and be included under the proposed Executive Order on employee-management relations in the Foreign Service. In denying the request in a letter dated October 13, 1971, the Federal Labor Relations Council stated, "... the President, by his Reorganization Plan and Executive Order 11603, has indicated that the Peace Corps and its staff more properly fit into a grouping of volunteer action programs than a grouping of foreign affairs agencies." Relying on such factors as "...the absence of career Foreign Service appointments, ...the limited rotation of assignments between the United States and overseas, ...and ACTION's authority to modify Foreign Service personnel policies or to establish new ones," the Council found that there exist fundamental differences between the conditions of Foreign Service employment in the foreign affairs agencies and such employment in ACTION, and these differences relate directly to the bases on which the President approved the State Department's request for a separate employee-management relations program suited to the unique conditions of Foreign Service employment in the foreign affairs agencies.

4/ There were a total of five agencies affected by the merger: Small Business Administration; Housing and Urban Development; Health, Education and Welfare; Office of Economic Opportunity; and Peace Corps.

The Activity is headed by a Director and Deputy Director who are responsible for the supervision and direction of the various volunteer programs. Reporting to the above officials are the ACTION Policy Board, the ACTION National Advisory Council, the Director's Personal Staff, and the six offices of the Assistant Director; namely, the Office of Public Affairs, the Office of Voluntary ACTION Liaison, the Office of Congressional Liaison, the Office of General Counsel, the Office of Staff Placement and Training, and the Office of Minority Affairs. Also reporting to the Director and Deputy Director are five Associate Directors: The Associate Director for Policy and Program, the Associate Director for Citizens Placement, 5/ the Associate Director for Domestic Operations, 6/ the Associate Director for International Operations, 7/ and the Associate Director for Administration and Finance.

The claimed unit consists of approximately 264 General Schedule employees. In addition, the Activity employs approximately 1,033 Foreign Service employees, 303 of whom are employed overseas. A majority of the Activity's General Schedule employees are employed under the Associate Director for Domestic Operations, while the majority of the Activity's Foreign Service employees are employed under the Associate Director for International Operations. As a result of the above-noted merger, various support functions at the Activity 8/ were staffed with a mixture of General Schedule and Foreign Service personnel. In this regard, the record discloses that General Schedule employees of the Activity in such classifications as personnel assistant, review officer, management and research analyst, mail clerk and voucher examiner, work alongside, perform the same job functions, and hold essentially the same job classifications as Foreign Service employees in their respective departments. Additionally, the record reveals that in several of the Activity's offices, General Schedule employees and Foreign Service employees have common supervision and are subject to the same day-to-day working conditions.

5/ This office is subdivided into three sections: Assignment, Selection and Processing, and Recruitment. The latter section consists of the National Office located in Washington, D.C. and four Regional Offices located throughout the United States.

6/ This office consists of the National Office and ten Regional Offices located throughout the United States.

7/ This office consists of the National Office and four international Regional Offices all of which are located in Washington, D. C. Although the international Regions are located in Washington, D. C., the Activity's international programs are carried out in 55 countries throughout the world.

8/ E.g., Office of Voluntary ACTION Liaison, Office of Staff Placement and Training, Associate Director for Policy and Program Development, Associate Director for Citizens Placement and Associate Director for Administration and Finance.

In support of their contention that the General Schedule employees have a community of interest separate and apart from that of the Foreign Service employees, the Activity and the AFGE place primary emphasis on the fact that General Schedule and Foreign Service employees are governed by different personnel systems and, therefore, have different benefits, rights, pay scales, and working conditions. It should be noted that similar arguments pertaining to the lack of common benefits, pay scales, ultimate control, etc., have previously been raised in representation cases under the Executive Order involving questions relating to the eligibility of off-duty military personnel for inclusion in exclusive bargaining units. 9/ In these cases I found that the determinative factor in ascertaining whether off-duty military personnel should be included in employee bargaining units was their immediate status while in the employment relationship and not what ultimate control they might be subject to at other times. I further found that the fact that off-duty military personnel did not share in some of the fringe benefits enjoyed by civilian personnel of the Activity did not minimize their community of interest with the civilian employees where both categories shared the same employment relationship with the Activity while on the job. In sum, therefore, the necessary indicia of employee community of interest under the Order will be found where there is interchange and contact among employees, where there is similarity of work performed, and where there is common supervision. On the other hand, standing alone, the lack of common benefits, pay scales, and ultimate control will not be considered dispositive as to the issue of community of interest.

Applying the foregoing rationale to the subject case, while the existence of variances between the General Schedule employees and the Foreign Service employees in such areas as personnel systems, benefits, rights, pay scales, and certain conditions of employment are factors to be considered in the determination of "community of interest," in my view, in the circumstances herein these factors are offset by the substantial evidence of the close working relationship between the Activity's employees in these two categories. 10/ Thus, as noted above, the evidence establishes

9/ See Department of the Navy, Naval Exchange, Mayport, Florida, A/SLMR No.24, and Army and Air Force Exchange Service, White Sands Missile Range Exchange, White Sands Missile Range, New Mexico, A/SLMR No. 25.

10/ See also Department of the Army, Military Ocean Terminal, Bayonne, New Jersey, A/SLMR No. 77, where I considered the variance in work performed by Wage Board and General Schedule employees as a factor in the determination of community of interest but found this factor offset by the close relationship of these two groups as shown through daily contact, common supervision, uniform personnel policies and practices, and overlapping of job functions.

that there are some Foreign Service employees of the Activity who work alongside General Schedule employees in the claimed unit, performing the same job functions. Further, they have essentially the same job classifications and supervision as the General Schedule employees in the petitioned for unit. In these circumstances, I find that the General Schedule employees in the petitioned for unit do not share a clear and identifiable community of interest separate and apart from the Foreign Service employees at the Activity. Further, in my opinion, such a fragmented unit would not promote effective dealings and efficiency of agency operations. Accordingly, I shall order that the AFGE's petition be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 22-2800 (RO) be, and it hereby is, dismissed.

Dated, Washington, D. C.
September 26, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

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

ARMY AND AIR FORCE EXCHANGE SERVICE,
ALASKAN EXCHANGE SYSTEM,
SOUTHERN DISTRICT AND HEADQUARTERS,
ELMENDORF AIR FORCE BASE AND
FORT RICHARDSON, ANCHORAGE, ALASKA
A/SLMR No. 208

This case arose as a result of a representation petition filed by the American Federation of Government Employees, AFL-CIO, Local 1668 (AFGE) for a unit of all employees of the Activity's Southern District and Headquarters. The parties stipulated to the appropriateness of the unit and the unit status of all employees except a store manager and a receiving supervisor, whose unit status was left to the determination of the Assistant Secretary because the parties could not agree on their alleged supervisory status.

The Assistant Secretary found that the claimed unit of all employees of the Activity's Southern District and Headquarters was appropriate for the purpose of exclusive recognition in that they shared a clear and identifiable community of interest. In this connection, the Assistant Secretary noted that all employees in the proposed unit are subject to same personnel policies and regulations; the same pay scales; are included on the same roster for "reduction-in-force" purposes; are transferred within the unit as needs dictate; and share essentially the same fringe benefits and working conditions. The Assistant Secretary further noted that job vacancies in the work force are posted on a unit-wide basis and that the employees in the claimed unit are geographically isolated from the other employees of the Alaskan Exchange System.

The Assistant Secretary accepted the stipulations of the parties with respect to the unit placement of certain management officials, supervisors, confidential employees, guards, employees engaged in Federal personnel work and a professional employee.

Regarding the alleged supervisors whose unit placement was left to the determination of the Assistant Secretary, the Assistant Secretary found that there was insufficient evidence on which to determine the unit placement of a "receiving supervisor" in view of the lack of any evidence on her alleged supervisory duties or responsibilities. The Assistant Secretary also found that a store manager was not a supervisor within the meaning of the Order in the absence of any evidence that the employee involved exercised any supervisory authority.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ARMY AND AIR FORCE EXCHANGE SERVICE,
ALASKAN EXCHANGE SYSTEM, SOUTHERN
DISTRICT AND HEADQUARTERS,
ELMENDORF AIR FORCE BASE AND
FORT RICHARDSON, ANCHORAGE, ALASKA

Activity 1/

and Case No. 71-2079(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1668

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 Dale L. Bennett. 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, American Federation of Government Employees, AFL-CIO, Local 1668, herein called the AFGE, seeks an election in a unit of all regular full-time and regular part-time employees, including regularly scheduled part-time military employees, employed by the Army and Air Force Exchange Service, Alaskan Exchange System, Southern District and headquarters, Elmendorf Air Force Base and Fort Richardson, Anchorage, Alaska, excluding temporary full-time employees (employed for 90 days or less nonrecurring or for a period not to exceed 180 days based

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

on a specific event nonrecurring), temporary part-time employees (employed for 90 days or less nonrecurring), casual and on-call employees, confidential secretaries, employees at all other installations in the Alaskan Exchange System, including employees at the Wildwood Air Force Station Exchange, employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, management officials, guards and supervisors as defined in the Executive Order. 2/ The Activity and the AFGE stipulated that the unit sought is appropriate for the purpose of exclusive recognition under the Executive Order, and agreed with respect to the unit placement of all employees except two alleged supervisors, whose unit placement was left to the determination of the Assistant Secretary.

The Army and Air Force Exchange Service is a nonappropriated fund instrumentality of the United States Department of Defense and is charged with the mission of operating retail and service facilities for the convenience of military personnel and their dependents and generating reasonable revenue from its operation for the Central Military Welfare Fund. It is headquartered in Dallas, Texas and is divided into five major divisions located within the continental United States and three major overseas divisions, including the Alaskan Exchange System, the division involved herein. Each of the divisions is responsible for the administration of a number of Exchange operations within a certain geographic area.

The Alaskan Exchange System consists of the following basic components: the headquarters and Southern District -- which contain the employees covered by the instant petition --, the Northern District and the Remote Stations Operations. The headquarters is comprised of the executive offices, the operating staff and the support staff. The Southern District is comprised of the exchange facilities located on the Elmendorf Air Force Base, Fort Richardson and the Wildwood Air Force Base. 3/ The headquarters and Southern District elements are located on the Elmendorf Air Force Base -- Fort Richardson complex, which is situated on two adjoining military reservations at Anchorage, Alaska. The Northern District office is located in Fairbanks, Alaska, some 300 land miles from Anchorage, and the Remote Stations are located between 300 and 1,600 miles from Anchorage.

The Activity is headed by a Commander who is responsible for its overall operation and administration. He is located at the Activity headquarters and is assisted by a Deputy Commander and a civilian executive, both of whom have been delegated certain administrative responsibilities. These top level administrators are located in the headquarters executive offices. Immediately below this line of authority is the operating staff encompassing the retail branch, the food branch and the vending, services and concessions branch. The operating staff functions as the liaison between the executive offices and the operational branches at the exchange level and also performs liaison functions between the executive offices and the support staff. The support staff performs administrative and support functions necessary and incidental to the conducting of an extensive retail operation. It consists of six branches: storage and distribution, finance and accounting, personnel and administration, engineering and maintenance, computer processing and inventory management. Among the employees in these branches are general clerks, contract clerks, personnel clerks, office machine operators, sign makers, custodial workers, accounting clerks, payroll clerks, cashiers, computer operators, key punch operators, data processing clerks, secretaries, procurement clerks, clerk typists, maintenance workers, carpenters, refrigeration and air conditioning technicians, electricians, mechanics, truck drivers, warehousemen and merchandise markers, who are classified as either regular full-time, regular part-time or military part-time, and who the parties agree should be included in the unit.

The Southern District is under the administration of an exchange officer and a general manager who are responsible for the day-to-day operation of the District. It is comprised of some thirteen retail stores, seven food service establishments and two service stations. Among the employees employed at these facilities are general clerks, sales clerks, cashier-checkers, stock handlers, custodial workers, mobile food operators, cooks, counter attendants, food service helpers, auto mechanics, service station attendants, vending equipment technicians, route servicemen, warehousemen, and vending machine attendants who are classified either as regular full-time, regular part-time or military part-time employees, and who the parties agreed should be included in the unit. 4/

2/ The unit appears as corrected at the hearing.

3/ The parties agreed to exclude employees of the Wildwood Air Force Base Exchange facilities from the claimed unit as such facilities were scheduled to be closed permanently, effective June 30, 1972.

4/ The record discloses that the Activity employs a number of temporary full-time and temporary part-time employees who are hired for a specific period of time which generally does not exceed 90 days except in unusual circumstances, in which case the employee may be hired

Continued

The evidence reveals that the employees in the proposed unit are subject to the same personnel policies and regulations; the same pay scales; and are included on a roster for "reduction-in-force" purposes which is restricted to non-appropriated fund employees employed in the Anchorage area. Also, while there are frequent transfers of employees between the headquarters and the Southern District, the transfer of employees between the Northern District and the Remote Stations Operations and the headquarters and the Southern District is minimal. In addition, when a vacancy creates a promotional opportunity at either the headquarters or in the Southern District, notices of the vacancy are posted at the headquarters and in the Southern District, but not at any of the other facilities of the Alaskan Exchange System. Finally, all of the employees in the proposed unit share essentially the same fringe benefits and working conditions. In these circumstances, and noting the fact that all employees in the proposed unit are located in the same geographic area which is separated by considerable distances from other employees of the Alaskan Exchange System, I find that the employees in the claimed unit share a clear and identifiable community of interest and that such a unit will promote effective dealings and efficiency of agency operations. 5/

Eligibility Issues

With the exception of those employees noted below, the parties agreed on the unit placement of all of the Activity's employees. The parties raised a question as to the supervisory status of Rhea Kale,

4/ for a period not to exceed 180 days. The record also reveals that the Activity employs a number of "on-call employees" who work only in emergencies and "casual employees" who perform specific, non-recurring jobs and whose work records are of a sporadic nature. Under these circumstances, I find, in agreement with the parties, that employees classified as temporary full-time, temporary part-time, casual, and on-call do not have a substantial and continuing interest in their terms and conditions of employment along with other employees in the claimed unit and therefore should be excluded from any unit found appropriate. Cf. Alaskan Exchange System, Base Exchange, Fort Greely, Alaska, A/SLMR No. 33 and Army and Air Force Exchange Service, Fort Huachuca Exchange Service, Fort Huachuca, Arizona, A/SLMR No. 167.

5/ Cf. Army and Air Force Exchange Service, Norton Air Force Base Exchange, Norton Air Force Base, California, A/SLMR No. 191.

the "receiving supervisor" at the main store at Fort Richardson, and Bernie Bell, who is the manager of a small retail store which is an annex of the main store at Elmendorf. The evidence revealed that Kale works in the receiving department of the main store at Fort Richardson. However, the record is silent as to her duties and while it appears that occasionally she receives assistance in her department from employees assigned to other departments of the store, there is no evidence as to whether she exercises supervisory authority with respect to such employees or any other employees. In these circumstances, I am unable to determine whether or not Rhea Kale is a supervisor within the meaning of the Executive Order and, accordingly, I shall make no finding in this regard. 6/

The evidence reveals that Bernie Bell is currently the only employee employed at the Activity's Sight Point annex. He is engaged in selling merchandise to the general public and is responsible for keeping the store at the above-named facility stocked with merchandise. He also is responsible for the funds used in the store's operations. The record reveals that Sight Point has never had more than two employees. As there is no evidence that in the performance of his job functions Bell exercises any supervisory authority, I find that he is not a supervisor within the meaning of the Executive Order. Accordingly, I shall include Bernie Bell in the unit found appropriate.

The parties' stipulation that Kathleen W. Walker, Martha Johnson and Nellie Pino are confidential employees and, as such, they should be excluded from the unit, is supported by record testimony which established that these employees have access to information concerning the Activity's labor relations policies and that they are secretaries to individuals who formulate and carry out such policies. Accordingly, I find that they are confidential employees and shall exclude them from the unit found appropriate.

The parties also stipulated that James C. Van Eck, a security inspector and Robert Nesvick, Jr., a messenger, are guards within the

6/ Also, I shall make no finding as to the supervisory status of Wilma K. Adams, who is employed in an annex of the Matanuska Hall retail store, in view of the absence of any evidence in the record concerning her supervisory duties or responsibilities.

meaning of the Executive Order and, as such, they should be excluded from the unit. 7/ As security inspector, Van Eck rotates among the Activity's retail stores and his responsibilities include the surveillance of store customers and employees to detect theft; detention of customers suspected of theft and placing them in the custody of the military police; reporting thefts by employees to management officials; and testifying in court against persons charged with theft. Also, he conducts surveys of the Activity's security system and makes recommendations to management designed to prevent customer shoplifting and employee pilferage. The messenger, Nesvick, is employed by the personnel department and his responsibilities include the delivery of mail and the transportation of the Activity's money and cash receipts to and from the bank. He also delivers change for the Activity's retail operations. He is armed and is expected to use force if necessary to protect the Activity's funds. In these circumstances and noting that both the messenger and the security inspector are responsible for enforcing against Activity employees and other persons rules to protect Activity property, I find that they are guards within the meaning of the Executive Order and shall exclude them from the unit found appropriate.

Based on the foregoing, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition within the meaning of the Executive Order:

> All regular full-time and regular part-time employees, including off-duty military personnel in either of the foregoing categories, employed by the Army and Air Force Exchange Service, Alaskan Exchange System, Southern District and Headquarters, excluding temporary full-time employees, temporary part-time employees, casual and on-call employees, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, 8/ professional employees, 9/ management officials, and supervisors and guards as defined in the Order.

7/ At the time of the hearing, the Activity employed two watchmen whose positions were scheduled to be abolished permanently by May 15, 1972, and who were responsible for protecting certain merchandise, principally weapons stored at the Activity's main storage depot, against theft from employees and the general public. In this connection, they carried firearms and were authorized to make arrests. Based on the foregoing, I find, in agreement with the parties, that the watchmen are guards within the meaning of the Executive Order and if they are still employed by the Activity in the same capacity they should be excluded from the unit found appropriate.

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

8/ The parties stipulated that employees who are classified as personnel clerks and who are engaged in making determinations as to the Activity's manpower needs, screening job applicants and passing on their qualifications to fill job vacancies, and processing new hires and terminations, are engaged in Federal personnel work in other than a clerical capacity and should be excluded from the unit. As there is no evidence that the stipulation to exclude the personnel clerks was improper, I shall exclude such employees from the unit found appropriate.

9/ The parties stipulated that D. C. Westfall, the Activity's Design Specialist should be excluded from the unit on the grounds that he is a professional employee. The evidence reveals that Westfall has a degree in architectural engineering and that he is responsible for preparing initial architectural designs used in connection with the reconstruction or renovation of the Activity's facilities. In these circumstances and the absence of any evidence that the stipulation of the parties was improper, I find that Westfall is a professional employee within the meaning of the Executive Order and, accordingly, I shall exclude him from the unit found appropriate.

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 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, AFL-CIO, Local 1668.

Dated, Washington, D. C.
September 29, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

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

HOUSING DIVISION, DIRECTORATE OF INDUSTRIAL OPERATIONS,
HEADQUARTERS 9TH INFANTRY DIVISION AND FORT LEWIS,
FORT LEWIS, WASHINGTON
A/SLMR No. 209

The representation petition filed in this case by the Petitioner, Lodge 2014, International Association of Machinists and Aerospace Workers, AFL-CIO (IAM), was for a unit of all Wage Board employees of the Housing Division, Directorate of Industrial Operations at Fort Lewis, Washington (approximately seven employees), excluding, among others, all General Schedule employees. The Activity objected to the requested unit because it excluded the Division's General Schedule employees (approximately 31).

The Assistant Secretary found that the petitioned for unit was not appropriate for the purpose of exclusive recognition, and he dismissed the petition. He noted that although the Activity had a long-standing collective-bargaining history of many representation units - some of which were as small and restricted in scope as the one involved in the subject case - all of these units, with one exception falling under Executive Order 11491, were established pursuant to Executive Order 10988. Under Section 10(b) of Executive Order 11491, as amended, the Assistant Secretary noted that to constitute an appropriate unit there must be evidence that the employees in such unit share a clear and identifiable community of interest and that the proposed unit will promote the effective dealings and efficiency of agency operations.

The Assistant Secretary found that the evidence indicated that the claimed unit did not meet the above requirements. Thus, the Activity's Housing Division Wage Board and General Schedule employees were integrated as a team working under almost identical conditions to provide housing facilities for military personnel connected with Fort Lewis. Also, other Wage Board employees having the same job classification at Fort Lewis, as employees in the claimed unit, performed comparable duties. In these circumstances, it was concluded that the claimed employees did not share a clear and identifiable community of interest separate and apart from other Activity employees, and that such a fragmented unit would not promote effective dealings and efficiency of agency operations.

A/SLMR No. 209

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

HOUSING DIVISION, DIRECTORATE OF INDUSTRIAL OPERATIONS,
HEADQUARTERS 9TH INFANTRY DIVISION AND FORT LEWIS,
FORT LEWIS, WASHINGTON 1/

Activity

and Case No. 71-2282 (RO)

LODGE 2014, INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO 2/

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 Dale L. Bennett. 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, Lodge 2014, International Association of Machinists and Aerospace Workers, AFL-CIO, herein called IAM, seeks an election in a unit composed of all Wage Board employees of the Housing Division, Directorate of Industrial Operations at Fort Lewis, Washington (approximately seven employees), excluding all General Schedule employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, professional employees, and supervisors and guards as defined in the Executive Order.

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 Activity's position is that the unit sought is not appropriate because it excludes General Schedule employees in this Division (approximately 31) who share a clear and identifiable community of interest with the Wage Board employees. It asserts that they all work under the overall supervision of the Fort Lewis Housing Officer, performing duties of an integrated nature involving day-to-day contact, and that they are all subject to the same personnel policies, procedures, and fringe benefits.

Facts

The Headquarters 9th Infantry Division and Fort Lewis at Fort Lewis, Washington, are separate U.S. Army operational components but are intrinsically related because the Fort Lewis mission is to support the Headquarters 9th Infantry Division garrisoned at that location. Fort Lewis additionally has administrative responsibility for three other Army facilities: (1) Fort Lawton at Seattle, Washington, which supports reserve activities and is about 50 miles distant; (2) Vancouver Barracks at Vancouver, Washington, which also supports reserve activities and is about 150 miles from Fort Lewis; and (3) Yakima Firing Center, Yakima, Washington, more than 130 miles away. All of the employees in the claimed unit work at Fort Lewis with the exception of one, employed at Fort Lawton.

Fort Lewis civilian operations are organizationally carried on primarily through eight directorates: (1) Comptroller, (2) Personnel and Community Activities, (3) Security, (4) Plans and Training, (5) Industrial Operations, (6) Medical Activities, (7) Communications and Electronics, and (8) Facilities Engineering. It is the fifth directorate above - Industrial Operations (DIO) - which encompasses the IAM's desired unit. The head of DIO, as in the case of the other directorate heads, reports to the Chief of Staff who, in turn, is directly under the Commanding General's office.

The DIO employs approximately 1,500 Wage Board and General Schedule employees, of whom 60 percent are in the former classification and 40 percent in the latter. Both classifications are assigned to various DIO divisions, the primary ones being: (1) Housing, (2) Procurement, (3) Maintenance, (4) Transportation, (5) Supply, (6) Services, and (7) Central Food Preparation Facility. There are 38 Wage Board and General Schedule employees in the Housing Division, including the seven claimed employees. This Division is headed by a Housing Project Manager who is immediately responsible to the DIO head. The manager is aided by a sergeant major and a secretary in running the Division.

There are three parts to the Housing Division: the Program and Budget Office; the Billeting Branch; and the Family Housing Branch. Only the Family Housing Branch includes any Wage Board classifications; the other two parts are manned by General Schedule employees, assisted, in some instances, by military personnel. Together, however, all Housing Division components function to provide housing for eligible military personnel at Fort Lewis (or at Fort Lawton to a limited extent). Such housing may be for families, transients, or bachelors, and it may involve on- or off-post housing locations. In any event, Division personnel must manage funds to support a housing program; find suitable housing; help individuals with moving in and/or out of housing; and establish housing maintenance, repair, and improvement procedures.

The Program and Budget Office is mainly concerned with administering the program and budget aspects of the Division's housing function. There is one civilian supervisor, two permanent General Schedule clerks, and one temporary employee allocated for the Office. They, as well as all Housing Division General Schedule employees, report to one of Fort Lewis' main post buildings. The record reveals that these particular Division General Schedule people rarely leave the building during their working day.

This is true, too, of the Division's Billeting Branch General Schedule employees who include a civilian supervisor, one General Schedule general supply assistant, and one General Schedule housing clerk. Seven military people, 40 to 50 nonappropriated fund employees, and 6 to 8 borrowed employees (the last two categories utilized during the summer months) are a part also of the Branch. The increase in office manpower during the summer follows from the Branch's duty to operate transient and bachelor quarters, for which there is a specific need during summer reserve training sessions, in contrast with family quarters which are necessary generally on a year-round basis.

The Division's Family Housing Branch attends to the particular needs involved in family-type housing. An Assistant Housing Project Manager directs the six components of the Branch, only two containing any Wage Board classifications - the Property Section and the Fort Lawton Assignment Section. The remaining four components, containing General Schedule classifications and some military personnel only, are: Assignment and Termination Section, Inspection Unit, Maintenance Section, and Housing Referral Section.

The Property Section, with both General Schedule and Wage Board employees, handles the moving of household goods. This necessitates the issuance of receipts upon delivery or pick up, and the movement of goods into or out of quarters or warehouses. The Property Section also has responsibility for the disposition of surplus or obsolete household equipment. A General Schedule supply officer supervises the entire Section, assisted by a General Schedule supply clerk and three military personnel. The rest of the Section consists of the following Wage Board classifications: a warehouse foreman, who supervises two or three motor vehicle operators, one forklift operator, and four warehousemen. There is also one Wage Board warehouseman at Fort Lawton, who is supervised at that location and rarely, if ever, comes in contact with any of Fort Lewis' Property Section Wage Board employees. All of these Wage Board individuals are engaged in identical work as indicated above. In doing so, while there are a number of warehouses on, at least, the Fort Lewis Post, Fort Lewis employees report each day to only the one in which their warehouse foreman maintains an office. This warehouse is about two miles away from the building in which the Division's General Schedule people have their offices. After reporting to the warehouse, the Wage Board employees are dispatched, for the remainder of the work day, to particular warehouses or housing locations which require the movement of household property. The forklift operator and warehousemen ride to these locations in trucks operated by the Section's motor vehicle drivers in order to carry out their assignments. Notwithstanding that the warehouse foreman is in supervisory charge of the Property Section's Wage Board employees, he does consult with its General Schedule supply officer about personnel matters, and the latter is, in fact, the foreman's own immediate supervisor.

The remaining components of the Family Housing Branch, with General Schedule and some military staffing, provide services which are directly connected with those of the Property Section. Thus, the Assignment and Termination Section, in conjunction with the Housing Referral Section (three General Schedule employees), arranges for the actual dispensation of housing units to individual families and for the release of families from their quarters who are moving to other localities. Both of these operations require an inspection and inventory of the property involved. It is also required that new occupants be introduced to their new residences and that their obligations be explained. When an occupant moves out, an inverse procedure is effected. The Branch's Inspection Unit is supervised by the Assignment and Termination Section. Five General Schedule quarters and property inspectors and one military man make up this unit and they are constantly proceeding from place to place, dealing with families and property. When problems with quarters are encountered by inspectors, the Maintenance Section is called upon for a possible remedy. 3/

3/ If household equipment is involved, for example, a defective stove, the Property Section's Wage Board employees may be asked to deliver a new one from one of the post's warehouses when the defective one cannot be repaired by maintenance people.

All Fort Lewis personnel (and the Fort Lawton warehouseman) are subject to the same personnel policies and regulations, and enjoy the same fringe benefits administered by the Fort Lewis civilian personnel office in which the personnel records also are maintained. Under the Comptroller, a central payroll office operates, with a single payday for all employees. Working and lunch hours are identical for General Schedule and Wage Board personnel. General Schedule and Wage Board people do not interchange duties, but Wage Board and General Schedule employees do transfer between directorates for promotion and reduction-in-force reasons.

The evidence establishes that the Activity has had a fairly long and complicated general collective-bargaining history. Since 1965, it has granted the IAM exclusive recognitions for various employee bargaining units, some situated in DIO divisions (except the Housing Division), and some in other directorates. The units have been confined to Wage Board employees. Currently, only a small number of the Activity's Wage Board employees, apparently somewhere between 25 and 50, are not represented by any labor organization. The record reveals that certain other directorates, located at Fort Lewis, employ motor vehicle operators and warehousemen, and some of these classifications remain unrepresented. Their functions correspond to the Wage Board employees in the claimed unit, except for the nature of the goods handled. A second labor organization - the American Federation of Government Employees, Local 1504, AFL-CIO (AFGE) - also represents units of DIO employees outside of the Housing Division, as well as employees in other directorates. These units include either both Wage Board (in some instances this means motor vehicle operators and warehousemen) and General Schedule classifications, or General Schedule classifications alone.

In terms of size, all of the Activity's units have varied a great deal, from an estimated 4 to 324 employees. However, in DIO units, a comparison shows that the number of employees represented by the AFGE and by the IAM is approximately equal. 4/ In other directorates, the IAM and the AFGE have divided employee representation along Wage Board and General Schedule employee lines, respectively, on a directorate-wide basis.

All of these existing exclusive recognitions were established pursuant to Executive Order 10988, with one exception; under Executive Order 11491, the AFGE was granted a General Schedule firefighter unit located in the Directorate of Facilities Engineering. All Wage Board employees in that directorate are represented by the IAM.

4/ During this proceeding, the IAM did not express a desire, in the alternative, to represent a combined Wage Board and General Schedule classifications unit in the DIO's Family Housing Branch or in the entire Housing Division.

Conclusions

Based on the foregoing circumstances, I find that the petitioned for unit, composed of all Wage Board employees of the Housing Division, Directorate of Industrial Operations at Fort Lewis, Washington, is inappropriate. A combination of factors influences my decision.

While the Activity has, in the past, granted exclusive recognition to the IAM for small Wage Board units, such units were established prior to the advent of Executive Order 11491. Under Section 10(b) of Executive Order 11491, as amended, in order to constitute an appropriate unit, the employees involved must share a clear and identifiable community of interest. In addition, the unit must be one which will promote effective dealings and efficiency of agency operations.

In my opinion, the facts presented above concerning the unit sought in the subject case do not meet the requirements of Executive Order 11491, as amended. Thus, it is clear that the Housing Division is a highly integrated operation within the scheme of the Activity's mission. Its Wage Board and General Schedule employees work as a team to accomplish the housing of military personnel connected with Fort Lewis and Fort Lawton. While some of these people remain stationed in offices, others move around, on and off the post, and this differentiation of working conditions is not along Wage Board and General Schedule lines. In almost all other respects, the personnel of this Division are subject to the same personnel policies and regulations, and enjoy the same fringe benefits. Moreover, the record reveals that there are other Fort Lewis Wage Board warehousemen, in other directorates, whose only significant difference from the warehousemen in the claimed unit is apparently that they move items in and out of warehouses other than household goods.

Under these circumstances, I find that the employees in the claimed unit do not share a clear and identifiable community of interest separate and apart from other Activity employees, and that such a fragmented unit would not promote effective dealings and efficiency of agency operations. Accordingly, I shall order that the IAM's petition be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 71-2282 (RO) be, and it hereby is, dismissed.

Dated, Washington, D. C.
September 29, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

September 29, 1972

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

UNITED STATES CUSTOMS SERVICE,
REGION IX, CHICAGO, ILLINOIS
A/SLMR No. 210

This case arose as a result of a representation petition filed by the National Customs Service Association (NCSA) seeking an election among all professional and nonprofessional employees in the Regionwide unit. The American Federation of Government Employees, AFL-CIO (AFGE) intervened. The Assistant Secretary found that the Regionwide unit was appropriate, in that there was a clear and identifiable community of interest among all of the employees in the Region, and that such a unit would promote effective dealings and efficiency of agency operations.

The Assistant Secretary further found that employees classified as Import Specialist Team Leader, Public Information Officer, Editorial Assistant, Administrative Officer, Miscellaneous Document Examiner, as well as "temporary" (intermittent) employees and Port Directors at "one-man" ports, should be included in the unit. With respect to the Port Directors at "one-man" ports, he noted that they were not management officials because they lacked authority to make, or to influence effectively the making of, policy necessary to the agency or activity with respect to personnel, procedures or programs and because they were engaged primarily in work functions similar to customs inspectors, who were part of the unit found appropriate.

The Assistant Secretary excluded employees classified as Secretary to the District Director on the basis that they were confidential employees. He found also that employees classified as Operations Officer were management officials and those classified as Supervisory Customs Inspector, Import Control Officer and Supervisory Customs Aid were supervisors within the meaning of the Order.

With respect to the parties' failure to submit certain requested information to the Hearing Officer, the Assistant Secretary noted that parties are expected to cooperate fully with the Hearing Officer's efforts to develop a full and complete record regarding the issues presented at the hearing. He indicated that in the future a lack of cooperation by the parties may require that a case be remanded to adduce further evidence or be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES CUSTOMS SERVICE,
REGION IX, CHICAGO, ILLINOIS

Activity

and

Case No. 52-2743(25)

NATIONAL CUSTOMS SERVICE ASSOCIATION

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Kenneth Mills. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 1/

1/ The parties were in agreement as to the appropriateness of the claimed unit in the subject case as well as to the categories of employees to be included in such unit. Accordingly, several times during the course of the hearing they moved that the hearing be closed. The Hearing Officer denied their motions. For the reasons enunciated in Army and Air Force Exchange Service, White Sands Missile Range Exchange, White Sands Missile Range, New Mexico, A/SLMR No. 25, I reject the contention that I should consider myself bound either by the parties' agreement as to the appropriateness of the unit sought or the unit inclusions or exclusions. Accordingly, the Hearing Officer's rulings in this regard are hereby affirmed.

Also, near the close of the hearing, the Hearing Officer denied a joint motion by the parties that the Hearing Officer permit the parties to proceed to a consent election on the basis of the stipulations made during the course of the hearing. Further, after the close of the hearing the National Customs Service Association, herein called NCSA, filed a Motion to Direct Consent Election or Alternatively to Expedite Consideration of Petition Filed Under Section 6 of Executive Order 11491. In view of my findings herein, I find it unnecessary to pass upon the Hearing Officer's ruling denying the parties' joint motion or the NCSA's post-hearing motion.

Upon the entire record in this case, 2/ including briefs filed by all the parties, the Assistant Secretary finds:

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

2. The NCSA seeks an election in a unit of all professional and nonprofessional employees in U. S. Customs Service, Region IX, excluding managerial employees, employees engaged in personnel work other than in a purely clerical capacity, and supervisors and guards as defined by the Order. 3/ The Activity and the Intervenor, American Federation of Government Employees, AFL-CIO, herein called AFGE, agree with the NCSA that the unit sought is appropriate.

The Bureau of Customs, a bureau of the United States Treasury Department, consists of a National Office in Washington, D.C. and nine Regional Offices throughout the country. It has the mission of collecting and protecting revenue and enforcing United States Customs and related laws. Region IX, encompassing a 14 state area, is divided into eight Districts which report to the Regional Commissioner's Office. The Regional Commissioner and his Headquarters staff, including two Assistant Regional Commissioners, one for Operations and one for Administration, are located in Chicago, Illinois.

Each District is under the overall supervision of a District Director and is divided into an Inspection and Control Division and a Classification and Value Division. Within each District are several ports which are under immediate supervision of Port Directors. The staff at each port varies in size from a single Port Director to over 50 employees.

The record reveals that all Districts in Region IX perform the same operational functions including, among other things, inspection, control, classification, valuation and collection in carrying out the Region's mission. In carrying out these functions, the same substantive duties and responsibilities are performed by employees in the same occupational categories throughout the Region. Thus, the employees utilize the same work methods, the same skills, and enforce the same regulations and laws.

2/ The Hearing Officer erroneously advised the parties that the Area Office file would be forwarded to the Assistant Secretary as part of the record in this case. The record of the proceeding as described in Section 202.15 of the Assistant Secretary's Regulations does not include the Area Office file. Accordingly, such file was not forwarded to the Assistant Secretary in connection with the consideration of the subject case.

3/ The unit sought was amended at the hearing to include professional employees.

The Regional Personnel Officer, located in the Regional Office, is the individual charged with the duty and responsibility for all dealings and negotiations with employee organizations in the Region. In this connection, the evidence reveals that the Region's established personnel policies, practices, rules and procedures apply equally to all Regional employees; that the personnel functions and records are centralized in the Regional Headquarters; that the area for consideration for the filling of Regional job vacancies is Regionwide; that there have been a substantial number of transfers between the District Offices and Regional Headquarters; that there is contact and communication between employees across divisional and organizational lines within and between the Districts on matters of operational concern to employees of the Region; that all discipline beyond an oral warning is administered by the Regional Commissioner; and that uniform career and personnel training programs are prepared and, in some instances, conducted by Regional Headquarters personnel for all employees of the Region.

In the above circumstances, I find that there is a clear and identifiable community of interest among all of the nonsupervisory employees of Region IX and that such a comprehensive unit would promote effective dealings and efficiency of agency operations.

Eligibility Issues 4/

The record discloses that there are issues of eligibility with respect to the following employee classifications:

Port Directors at "One-Man" Ports

At each of the ports within Region IX there are Port Directors who are responsible for the full range of Customs activities at their respective

4/ At the opening of the hearing, the Hearing Officer rejected a joint exhibit of all the parties purporting to stipulate the facts on several categories of employees which had been in dispute prior to the opening of the hearing. I find that the Hearing Officer properly rejected the parties' exhibit as several of the stipulations consisted only of conclusionary language unsupported by facts.

Thereafter, the parties made separate stipulations of fact which I find that the Hearing Officer correctly rejected when such stipulations consisted only of conclusionary language. However, on at least one occasion, the Hearing Officer rejected a portion of a stipulation concluding that a category of employees was excludable while accepting the factual support for the conclusion. I find that the Hearing Officer erred in this regard as stipulations should be accepted where the ultimate conclusion is supported by facts. Accordingly, the Hearing Officer's ruling in this latter regard is reversed and in reaching the disposition in this matter I shall consider the entire stipulation, including the conclusionary language.

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ports. The parties are in agreement that the Port Directors who work alone at their stations should be excluded from the unit as managerial employees in that their duties and interests are more closely aligned with those who formulate policy than with those who carry out the resultant policy.

The record discloses that there are 23 "one-man" Port Directors in Region IX who work along with an official of the Immigration Service. The administrative duties at these port offices have been divided so that approximately one-half of the facilities are administered by "one-man" Port Directors and the other half by Immigration officials. These Port Directors perform the same inspection and examination functions that customs inspectors perform at the larger ports, which include inspection of cargo, carriers and passengers arriving or departing by several modes of transportation. In addition, their duties include enforecement of Customs and other related laws, as well as the detention and arrest, if necessary, of persons involved in violation of such laws. These Port Directors also prepare daily and other periodic reports concerning the administration of the Customs activities at their respective ports. Further, the record reveals that the Port Directors at "one-man" ports attend meetings called by the District Director at which time management policies for the ports are discussed.

Under the foregoing circumstances, and noting the absence of any evidence that "one-man" Port Directors have the authority to make, or to influence effectively the making of, policy necessary to the agency or activity with respect to personnel, procedures or programs 5/ and the fact that these employees primarily are engaged in work functions similar to those of inspectors at larger ports, I find that Port Directors at "one-man" ports are not management officials within the meaning of the Order. Accordingly, I shall include them in the unit found appropriate.

Operations Officers

The parties stipulated that the Operations Officers, who are employed in the Classification and Value Division and the Inspection and Control Division of the Regional Office's Operations section, are management officials within the meaning of the Order.

The record reveals that the Operations Officers, acting as representatives of the Regional Commissioner, consider matters relating to personnel practices and policies, as well as general working conditions, during their visits to the various field locations within the Region. They also advise the Regional Commissioner concerning management policies, programs and operating procedure changes. Further, they have the authority to inaugurate,

5/ Cf. Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135.

after consultation with the District Director, and without prior reference to the Regional Office, procedures and organizational matters and to require that such matters become effective.

On the basis of the above, I find that the Operations Officers are management officials within the meaning of the Order in that they influence effectively the making of policy necessary to the Region with respect to personnel, procedures, or programs. Accordingly, I will exclude such employees from the unit found appropriate.

Secretaries to the District Directors

The record reveals that the secretaries to the various District Directors have regular access to confidential information relating to labor-management matters, to office and personnel files not available to other employees in the unit, and to personnel appraisals. Also, they prepare or assist in the preparation of memoranda and documents in connection with disciplinary proceedings or proposed adverse actions. Under these circumstances, I find that these employees should be excluded from the unit found appropriate as confidential employees. 6/

Supervisory Customs Inspectors; Import Control Officers; Supervisory Customs Aids

The parties take the position that the employees in the job classifications of Supervisory Customs Inspector, Import Control Officer and Supervisory Customs Aid are supervisors within the meaning of the Order.

With respect to the 36 employees currently employed as Supervisory Customs Inspectors at various port locations throughout the Region, the record reveals that they plan, assign and coordinate the work of from 3 to 12 customs inspectors. In connection with work assignments, they make minor changes in work flow, methods, procedures and staffing; make workload adjustments; resolve problems between employees, the public and carriers; resolve grievances of employees; direct and assign work, including changing schedules, approving leave and assigning overtime; prepare performance evaluations, and make evaluations for promotions. While their job description indicates that they perform journeyman tasks when not engaged in supervisory functions, the record reveals that the Supervisory Customs Inspectors spend almost all of their time engaged in supervisory and administrative duties.

The two largest District Offices in Detroit and Chicago have an Import Control Officer in charge of the ministerial section of the Classification and Value Division Office which has a staff of about 20 employees. The record reveals that the Import Control Officer is responsible for the day-to-day operations of the section; initiates performance evaluations of other supervisory employees in his section; reviews the evaluations of the other

6/ See Treasury Department, Bureau of Customs, Region IV, A/SLMR No. 152.

employees; disciplines employees and directs work and controls work assignments. The record reveals also that the Import Control Officer does not perform the technical work engaged in by the other members of the ministerial section.

Within the ministerial sections of the Detroit and Chicago District Offices there are employees classified as Supervisory Customs Aids who plan and review the work of Customs Aids. In performing their duties, the Supervisory Customs Aids are involved in making work assignments, reviewing and evaluating the work performance of subordinates, resolving informal complaints and making recommendations on serious grievances to the Import Control Officer, effectuating warnings and reprimands and recommending action in more serious cases. Supervisory Customs Aids also have the authority to grant annual and sick leave.

Based on the foregoing evidence, I find that the employees classified as Supervisory Customs Inspectors, Import Control Officers and Supervisory Customs Aids are supervisors as defined by Section 2(c) of the Order and should be excluded from the unit found appropriate.

Import Specialist Team Leaders; Administrative Officers; Public Information Officer; Editorial Assistant; Miscellaneous Document Examiners

The parties contend that employees in the job classifications Import Specialist Team Leader, Administrative Officer, Public Information Officer, Editorial Assistant and Miscellaneous Document Examiner are not supervisors and they stipulated that the job descriptions in each category constituted an accurate description of their functions. Additionally, with respect to the classification Import Specialist Team Leader, the parties stipulated that they perform essentially the same duties as performed by the same classification of employees in Region IV of the Customs Service who were found by the Assistant Secretary not to be supervisors. 7/ In view of the parties' stipulation and noting the finding as to eligibility in Treasury Department, Bureau of Customs, Region IV, cited above, I find no basis to exclude the employees in the classifications Import Specialist Team Leader, Administrative Officer, Public Information Officer, Editorial Assistant and Miscellaneous Document Examiner from the unit found appropriate.

"Temporary" (Intermittent) Employees 8/

The parties contend that employees classified as "temporary," (both regular part-time and when-actually-employed employees (WAE)), of whom there are approximately 88 presently employed in Region IX, should be included in the unit. In support of their position, the parties stipulated that the "temporary" employees perform their duties generally in cooperation and side-by-side with the regular full-time employees. Additionally, it was stipulated that the employment relationship of the "temporary" employees is substantially similar to the intermittent employees described in Treasury Department, Bureau of Customs, Region IV, cited above. 9/ The record reveals that the three WAE Port Directors at "one-man" ports are not seasonal employees but, rather, work on a continual basis from year-to-year with no assigned duty hours on any given day. Under the foregoing circumstances, and noting that "temporary" employees have a reasonable expectancy of continued employment, I find that they should be included in the unit found appropriate.

Other Categories of Employees

During the course of the hearing, the Hearing Officer requested from the parties information concerning all classifications of employees the parties would exclude from the claimed unit. The Activity refused to supply such information, contending that it had been advised that the hearing would be concerned only with categories of employees which were in dispute prior to the hearing. 10/ Near the end of the hearing and in its brief the Activity asserted that the purported last minute request of the Hearing Officer for evidence concerning additional exclusions, if complied with, would have resulted in an inadequate and incomplete record as the Activity had no witnesses available to supply such information. The Activity also ignored a request by the Hearing Officer that job descriptions for all exclusions be sent to the Area Office within three days from the closing of the hearing so they could be included in the record. The NCSA and the AFGE, both during the hearing and in their briefs, supported the Activity's position.

Section 6(a)(1) of the Order grants to the Assistant Secretary the authority to decide questions as to the appropriate unit for the purpose

7/ See Treasury Department, Bureau of Customs, Region IV, cited above.

8/ It appears that the employees called "temporary" employees in the instant case are the same as the employees designated as "intermittent" employees in Treasury Department, Bureau of Customs, Region IV, cited above.

9/ In A/SLMR No. 152 intermittent employees were included in the unit found appropriate because they had a reasonable expectancy of continued employment from year-to-year and shared with regular full-time employees common supervision, pay scale, job assignments, working conditions, and uniform labor relations policies.

10/ Contrary to this contention of the Activity, the record and the Activity's brief reflect that the parties were aware, well before the hearing, that they might be called upon to furnish such information. Thus, in a letter of March 13, 1972, the Area Administrator, in answer to a request for a statement clarifying the hearing notice, not only listed a number of positions whose placement in or out of the unit remained unresolved at that time, but pointed out that the list was not all inclusive and that, "Each party should be prepared to furnish information relative to any position within the Chicago Region of Customs...."

of exclusive recognition which necessarily include questions related to unit inclusions and exclusions. In the processing of representation petitions under the Executive Order, Hearing Officers act as agents of the Assistant Secretary for the purpose of developing a complete record so that decisions may be rendered on the basis of all the relevant facts. While in the instant case, I find that the evidence is sufficient to reach a decision regarding the appropriateness of the unit sought as well as several inclusions and exclusions, I also find that the parties herein improperly refused to cooperate with the Hearing Officer's efforts to perform his function of developing a full and complete record. In this connection, I find that the Activity's ignoring the Hearing Officer's request for job descriptions to be indefensible. In the future, the type of conduct demonstrated by the parties in the subject case may require that a case be remanded to adduce further evidence or be dismissed. To prevent a recurrence of the aforementioned improper conduct and the possible results thereof, National Office officials of the Agency and the labor organizations involved herein should take such steps as are necessary to assure that such improper conduct by their representatives will not be repeated in future proceedings before the Assistant Secretary.

Based on all of the foregoing circumstances, I find that the following employees may constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of Executive Order 11491:

> All professional and nonprofessional employees of U. S. Customs Service, Region IX, including employees classified as Import Specialist Team Leader, Public Information Officer, Editorial Assistant, Administrative Officer, Miscellaneous Document Examiner, and Port Directors at "one-man" ports and "temporary" employees, excluding employees classified as Secretary to the District Director, Operations Officer, Supervisory Customs Inspector, Import Control Officer and Supervisory Customs Aid, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

As noted above, the unit found appropriate includes professional employees. 11/ 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 the majority of the professional employees votes for inclusion in such a unit. Accordingly, the desire of the professional employees as to inclusion in a unit with nonprofessional employees must be ascertained. I, therefore, shall direct separate elections in the following voting groups:

> Voting Group (a): All professional employees of the U. S. Customs Service, Region IX, excluding nonprofessional employees, employees classified as Secretary to the District Director, Operations Officer, Supervisory Customs Inspector, Import Control Officer, Supervisory Customs Aid, employees engaged in Federal personnel work in other than a purely clerical capacity, management offficials, and supervisors and guards as defined in the Order.
>
> Voting Group (b): All nonprofessional employees of the U. S. Customs Service, Region IX, excluding professional employees, employees classified as Secretary to the District Director, Operations Officer, Supervisory Customs Inspector, Import Control Officer, and Supervisory Customs Aid, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

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

The employees in the professional voting group (a) will be asked two questions on their ballots: (1) whether or not they wish to be included with the nonprofessional employees for the purpose of exclusive recognition, and (2) whether they wish to be represented for the purpose of exclusive recognition by the NCSA, the AFGE or by neither. 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 appropriate Area Administrator indicating whether the NCSA, the AFGE or neither was selected by the professional employee unit.

The unit determination in the subject case is based in part, then, upon 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

11/ As the record does not set forth sufficient facts with respect to employees alleged to be professionals within the meaning of the Order (accountants and chemists), I shall make no finding as to which employee categories within the claimed unit are professional.

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 U. S. Customs Service, Region IX, including employees classified as Import Specialist Team Leader, Public Information Officer, Editorial Assistant, Administrative Officer, Miscellaneous Document Examiner, and Port Directors at "one-man" ports and "temporary" employees, excluding employees classified as Secretary to the District Director, Operations Officer, Supervisory Customs Inspector, Import Control Officer and Supervisory Customs Aid, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

2. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find that the following two groups of employees 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 U. S. Customs Service, Region IX, excluding nonprofessional employees, employees classified as Secretary to the District Director, Operations Officer, Supervisory Customs Inspector, Import Control Officer, Supervisory Customs Aid, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.
>
> (b) All nonprofessional employees of the U. S. Customs Service, Region IX, excluding professional employees, employees classified as Secretary to the District Director, Operations Officer, Supervisory Customs Inspector, Import Control Officer, Supervisory Customs Aid, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

DIRECTION OF ELECTION 12/

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

Dated, Washington, D. C.
September 29, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

12/ The record in the subject case is unclear as to whether the inclusion of employees classified as Import Specialist Team Leader, Administrative Officer, Public Information Officer, Editorial Assistant, Miscellaneous Document Examiner and Port Directors at "one-man" ports, as well as professional employees and "temporary" employees in the petitioned for unit renders inadequate the NCSA's showing of interest. Accordingly, before proceeding to an election in the subject case, the appropriate Area Administrator is directed to reevaluate the showing of interest. If he determines that, based on the inclusion of certain employees in the above-named categories, the NCSA's showing of interest is inadequate, the petition in this case should be dismissed.

October 30, 1972

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

U. S. DEPARTMENT OF DEFENSE, DEPARTMENT OF
THE ARMY, ARMY MATERIEL COMMAND, AUTOMATED
LOGISTICS MANAGEMENT SYSTEMS AGENCY
A/SLMR No. 211

This case involves a complaint filed by National Federation of Federal Employees, Local 1763 (Complainant) against U. S. Department of Defense (DOD), Department of the Army, Army Materiel Command, Automated Logistics Management Systems Agency (Respondent) alleging a violation of Section 19(a)(6) of the Order. The basis of the complaint was that the Respondent, in accordance with DOD policy, had refused to negotiate a dues withholding agreement separate and apart from any negotiations regarding a basic collective-bargaining agreement. The Complainant additionally alleged that the DOD policy violated the Order and that the charge filed against the Respondent had not been replied to within 30 days from the receipt thereof by the Respondent and that such failure was in violation of Section 203.2 of the Assistant Secretary's Regulations. This case was before the Assistant Secretary based on a stipulation of facts, issues and accompanying exhibits submitted by the parties.

With respect to the unfair labor practice allegation based on the alleged failure of the Respondent to reply to the charge filed by the Complainant within 30 days of its receipt, the Assistant Secretary found that such a reply was not required under Section 203.2 of the Assistant Secretary's Regulations and that, in any event, a failure to follow the Regulations in this regard would not constitute a refusal to consult, confer, or negotiate within the meaning of the Order.

The Assistant Secretary also concluded that the issues raised as a result of the Respondent's refusal to negotiate a separate dues withholding agreement based on an existing agency policy involved questions of negotiability. In these circumstances, it was determined that the proper resolution of such issues was through the Section 11(c)(2) - 11(c)(4) procedures of the Order. Accordingly, the Assistant Secretary found that the complaint could not be entertained by him at the present time and, therefore,he ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. DEPARTMENT OF DEFENSE,
DEPARTMENT OF THE ARMY,
ARMY MATERIEL COMMAND,
AUTOMATED LOGISTICS MANAGEMENT
SYSTEMS AGENCY

Respondent

and

Case No. 62-3093(CA)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1763

Complainant

DECISION AND ORDER

This matter is before the Assistant Secretary pursuant to Regional Administrator Cullen P. Keough's August 11, 1972 Order Transferring Case to the Assistant Secretary of Labor pursuant to Section 205.5(a) of the Rules and Regulations. Upon consideration of the entire record in the subject case, which includes the parties' stipulation of facts and accompanying exhibits, 1/ I find as follows:

On February 8, 1972, 2/ the National Federation of Federal Employees, Local 1763, herein called the Complainant, filed an unfair labor practice charge pursuant to Section 203.2 of the Assistant Secretary's Regulations, wherein it was contended that the U. S. Department of Defense Department of the Army, Army Materiel Command, Automated Logistics Management Systems Agency, herein called the Respondent, had violated Section 19(a)(1), (2), (5) and (6) of Executive Order 11491, as amended, by refusing to negotiate a dues withholding agreement prior to the negotiation of a basic collective-bargaining agreement.

On April 10 the complaint in the subject case was filed alleging that the Respondent had violated Section 19(a)(1), (3) and (6) of the Order based on its failure to respond to the Complainant's unfair labor

1/ The parties did not file briefs.

2/ Unless otherwise indicated, all dates occurred in 1972.

practice charge within the 30 day "timeframe." On July 12 the complaint was amended to delete the 19(a)(1) and (3) allegations but retained the 19(a)(6) allegation with respect to the failure to respond to the Complainant's unfair labor practice charge. 3/

In the parties' stipulation of facts it is requested that the Assistant Secretary render a decision with respect to the following issues: (1) whether the Respondent violated Section 203.2 of the Assistant Secretary's Regulations when it failed to respond within 30 days to the charge 4/ filed on February 8; (2) whether the Respondent violated Section 19(a)(6) of the Order when it refused to negotiate a dues withholding agreement in advance of a basic collective-bargaining agreement; and (3) whether the established policy of the Department of Defense, herein called DOD, as reflected in Labor Relations Bulletin No. 52 5/ regarding dues withholding agreements is in conflict with the provisions of the Order.

The stipulation reveals that on January 19 an election was conducted in which a majority of the unit employees chose the Complainant as their exclusive bargaining representative. On January 25, prior to the issuance of the Certification of Representative, 6/ the Complainant wrote the Respondent enclosing a draft dues withholding agreement and requesting the Respondent to enter into negotiations regarding such an agreement. In its letter, the Complainant indicated that any separate agreement reached as to dues withholding would be included in "the basic contract to be negotiated at a later date."

On January 26 in a telephone conversation between the Respondent's Civilian Personnel Officer, the Complainant's Acting President and an official of the Labor Relations Civilian Personnel Division of the Army Materiel Command, Washington, D.C., the latter stated that in accordance with the policy of the DOD and the Department of the Army regarding dues withholding agreements the Army Materiel Command had instructed the Respondent to deny any request for a dues withholding agreement until the negotiation of a basic collective-bargaining agreement.

On February 7, the Respondent replied in writing to the Complainant's January 25 request to negotiate a dues withholding agreement and stated that such request could not be "honored." Also, the Respondent confirmed the Army Materiel Command's policy discussed previously in the parties' telephone conversation of January 26, and enclosed a letter to the Respondent from Army Materiel Command Headquarters dated January 31 (1) confirming the January 26 telephone conversation; (2) enunciating the policy of the DOD and the Department of the Army that "members of units granted exclusive recognition after 23 November 1971, are not entitled to have dues withheld unless they have an approved labor-management negotiated agreement that includes a dues withholding provision"; and (3) advising that the matter had been discussed with the national headquarters of National Federation of Federal Employees.

All of the facts presented above are derived from the parties' stipulation and accompanying exhibits.

As to the first issue presented involving the Respondent's alleged failure to respond within 30 days to the Complainant's charge of February 8, there is no requirement under the Assistant Secretary's Regulations that a party against whom a charge has been filed must file a response to such charge. Rather, the applicable Regulations provide, in part, that if informal attempts to resolve the alleged unfair labor practice are unsuccessful in disposing of the matter within 30 days, a party may file a complaint. The only other limitations on the filing of a complaint are that it must be filed within 9 months of the occurrence of the alleged unfair labor practice or within 30 days of the receipt by the charging party of the final decision, whichever is the shorter period of time.

However, even assuming that the Respondent's conduct was inconsistent with the Assistant Secretary's Regulations, it would not follow that such conduct was in derogation of its obligation to consult, confer, or negotiate under the Order. Thus, the obligation to consult, confer, or negotiate relates to the collective-bargaining relationship between an

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3/ While the complaint, as amended, alleges specifically a refusal to consult, confer, or negotiate based on the failure to respond to the Complainant's unfair labor practice charge, it is clear that the gravamen of the complaint herein was the Respondent's refusal to negotiate a dues withholding agreement prior to negotiating an overall collective-bargaining agreement. In these circumstances, I shall not limit my consideration of the unfair labor practice complaint herein to the allegation regarding the failure to respond to the Complainant's charge.

4/ Although the Complainant refers to its February 8 letter as a "complaint," it appears that such letter was, in fact, an unfair labor practice charge within the meaning of Section 203.2 of the Assistant Secretary's Regulations.

5/ The pertinent provision of the Bulletin, dated September 22, 1971, stated: "Where first contracts are being negotiated, dues check-off proposals will be considered as part of the total bargaining package... The point to keep in mind is that dues check-off is not a right accrued at the time exclusive status is certified by the Labor Department. When a labor organization is certified as the exclusive bargaining agent, it earns the right to negotiate with respect to personnel policies, practices and working conditions affecting employees in the unit. The negotiation of dues check-off arrangements is a part of the total package and does not exist as an independent right."

6/ The Complainant was certified as the exclusive bargaining representative on January 28.

incumbent labor organization and an agency or activity. It does not relate to whether one of the parties in a collective-bargaining relationship is complying with Section 203 of the Assistant Secretary's Regulations. Questions relating to compliance with such Regulations are administrative matters to be enforced by the Assistant Secretary in the processing of unfair labor practice cases under the Order.

With respect to the remaining issues involving questions related to the Respondent's refusal to negotiate a dues withholding agreement prior to negotiating an overall collective-bargaining agreement, it is clear that Respondent at no time informed the Complainant that dues withholding was not a subject for negotiations. Rather, the Respondent took the position that established agency policy prohibited the Respondent from entering into negotiations with respect to a dues withholding agreement separate and apart from an "approved labor-management negotiated agreement." It is this policy, as interpreted by the Respondent, and the resulting refusal by the Respondent to discuss the matter prior to the parties' negotiations regarding a "total bargaining package" which the Complainant asserts are violative of Section 19(a)(6) of the Order.

The Respondent's position in this matter is that it cannot negotiate a separate dues withholding agreement because of an existing agency policy which requires that the subject of dues withholding be considered a part of the "total bargaining package." This position raises a negotiability issue. The proper resolution of such an issue is through the Section 11(c)(2) -- 11(c)(4) procedures of the Order. 7/ In these circumstances, I find that the unfair labor practice complaint in the subject case may not be entertained by the Assistant Secretary at this time. 8/ Accordingly, I shall order that the complaint be dismissed.

7/ Section 11(c) provides that: "If, in connection with negotiations, an issue develops as to whether a proposal is contrary to law, regulation, controlling agreement, or this Order and therefore not negotiable, it shall be resolved as follows: (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."

8/ See Army and Air Force Exchange Service, Keesler Consolidated Exchange, A/SLMR No. 144. See also Report on a Decision of the Assistant Secretary, Report No. 26.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 62-3093(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
October 30, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

October 30, 1972

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

DEPARTMENT OF INTERIOR,
BUREAU OF LAND MANAGEMENT,
DISTRICT OFFICE,
LAKEVIEW, OREGON
A/SLMR No. 212

The Petitioner, National Federation of Federal Employees, Local 642, (NFFE) sought an election in a unit of all the Activity's professional and nonprofessional employees. The Activity contended that employees classified as "professionals" should be excluded from the unit because they do not share a community of interest with "nonprofessional" employees. It contended also that some 30 to 35 employees hired seasonally as firefighters and who are designated as "temporary" employees should be included in the unit.

The Assistant Secretary stated that the test of whether the alleged "professional" and the "nonprofessional" employees may be joined in the same unit is whether such employees share common conditions of employment and thus have a clear and identifiable community of interest with each other. He found that such a community of interest existed in the instant case, and he also noted that Section 10(b)(4) of the Order provides professional employees with the opportunity to decide as a group as to whether they wish to be included with nonprofessional employees.

The Assistant Secretary found further that the claimed unit was appropriate. In this connection, he noted that the Activity (Lakeview District Office) constitutes a distinct administrative and geographic subdivision of the Bureau of Land Management; that the District Manager exercises initial decision-making authority over the public lands within the District and exercises substantial control over District personnel; and that there are uniform personnel policies and programs for the employees within the claimed unit.

The Assistant Secretary found that some 30 to 35 "temporary" or "seasonal" employees, who were hired each year as firefighters for the months of June through September, had a reasonable expectancy of future employment, and thus shared a community of interest with other Activity employees and should be included in the unit. Furthermore, the Assistant Secretary found that in seasonal industries an adequate showing of interest may be established based on the number of employees in the unit at the time the representation petition is filed. The Assistant Secretary found also that the Fire Control Technician, who acts as a supervisor for the "seasonal" employees and for the rest of the year is a rank-and-file employee, should be included in the employee bargaining unit during the portion of the working year he serves as a rank-and-file employee, and that such a "seasonal supervisor" is eligible to vote in a representation election if he is not in a supervisory status at the time of the election. In addition, the Assistant Secretary found the Secretary to the District Manager was a confidential employee who should be excluded from the unit found appropriate.

The Assistant Secretary found that the Realty Specialist was not a professional employee as the record did not indicate he had different duties or substantially different educational and job requirements from the Realty Specialist who was found not to be a professional in Department of the Interior, Bureau of Land Management, Riverside District and Land Office, A/SLMR No. 170. The Assistant Secretary concluded that the record was not adequate to make a determination as to the professional status of certain other job classifications: Range and Watershed Specialist, Wildlife Biologist, Range Conservationist, Forester, and Civil Engineer. In this connection, he noted that while the record reflected in certain instances the actual educational background of the alleged "professional" employees, it did not reflect clearly the educational requirements for these categories; that the record did not reveal whether the product of any specialized intellectual instruction within such job descriptions would, in fact, be utilized in the performance of their work; and that the limited description of the work performed did not indicate whether the criteria for professional status set forth in A/SLMR No. 170 were fully met. As a self-determination election would not be warranted if these employees were not professional employees, the Assistant Secretary remanded the case to the Regional Administrator to secure additional evidence.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF INTERIOR,
BUREAU OF LAND MANAGEMENT,
DISTRICT OFFICE,
LAKEVIEW, OREGON

Activity

and

Case No. 71-2120(RO)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 642

Petitioner

DECISION AND REMAND

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

Upon the entire record, including a brief filed by the Activity, 1/ the Assistant Secretary finds:

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

2. The NFFE seeks an election in the following unit: All employees of the Bureau of Land Management District Office, Lakeview, Oregon, with the exception of managers, guards, supervisors and Federal personnel employees other than those in a purely clerical capacity. The Activity agrees that the unit sought is appropriate, but contends that employees classified as "professionals" should be excluded because they do not share a community of interest with "nonprofessional" employees. It contends also that those employees who are hired seasonally as firefighters and who are designated as "temporary" should be included in the unit.

1/ The Petitioner, National Federation of Federal Employees, Local 642, herein called NFFE, filed an untimely brief which has not been considered.

The Activity is part of the Bureau of Land Management whose overall mission is to manage and protect the resources of the public lands and to make them available for various purposes in order to serve the national interest. Directly under the Bureau Office in Washington, D. C., are a number of state offices. Under the state offices are various district offices. In addition to the state and district offices there are two Service Centers which are on the same organizational level as the state offices and which provide certain special services to all of the state offices. Thus, the Denver Service Center provides payroll, procurement, design capability, and financial management record keeping for all the state offices and the Portland Service Center provides contracting services, procurement of capitalized property, and detailed road engineering for the same offices. 2/

The record discloses that the Activity, the Lakeview District Office, is headquartered in Lakeview, Oregon, and administers a section of public land. 3/ It is under the supervision of a District Manager, and employs some 28 full-time employees. Also, during the summer months the Activity employs some 30 to 35 "temporary" employees as fire fighters.

The Activity is divided administratively into three divisions: Resource Management, Administration, and Operations, each headed by a division chief. It is divided also into three geographic areas of sub-responsibility, each headed by an Area Manager: High Desert, Warner Lakes and Lost River. However, with the exception of two Wage Board (WB) equipment operators and a General Schedule (GS) Range Technician, who are all under the Division of Operations and work out of various field facilities, all the Activity's employees, including the Area Managers, are stationed at the Lakeview, Oregon, headquarters. The Activity's personnel policies are uniform for all of its employees, and while some of these policies are determined at the Service Center and at the State Office, the record reveals that the District Manager and his staff have authority with respect to hiring, reprimanding, rating, discharging, and promoting District employees. The record reveals that the District Manager is responsible for supervision and guidance of all employees in the District and that he develops the annual work plan for the Lakeview District subject

2/ The Service Centers also provide personnel and specialized services in the fields of Range and Watershed Conservation, Wildlife Management, Forestry, and Real Estate, for the specific states in their own service center area. For this purpose, the Portland Service Center area encompasses the states of Oregon, Idaho, Nevada, California, Washington, and Alaska, while the Denver Service Center area includes the states of Montana, Wyoming, Colorado, Utah, Arizona, and New Mexico.

3/ The Lakeview District Office is one of ten district offices under the Portland State Office and is located approximately 340 miles from that State Office.

only to Bureau guidelines. The record reveals also that the District Manager is responsible for the performance of the Activity without any significant supervision from the State Office and that he is responsible for all initial decisions regarding the disposition and use of the land under the Activity's jurisdiction.

While the Activity agrees with the NFFE that a unit consisting of the Lakeview District Office is appropriate, it contends that certain of its employees are "professionals" who do not have a clear and identifiable community of interest with the "nonprofessional" employees and, therefore, should be excluded from any unit found appropriate. The Activity concedes, and the evidence establishes, that the employees alleged to be "professionals" share common supervision and facilities with the other employees of the Lakeview District Office, are paid under the same uniform pay schedule as other GS employees and are entitled to the same annual leave, sick leave, and retirement benefits as other permanent employees. However, it contends that because of special educational qualifications, differences in job functions, the lack of interchange, and different career opportunities, employees classed as "professionals" by the Activity should be excluded from any unit found appropriate.

In my view, the test to be applied in determining whether professional and nonprofessional employees may be joined in the same unit is whether such employees share common conditions of employment, such as common supervision, leave, and benefits, and have a clear and identifiable community of interest with each other. I find that the evidence cited above establishes that such a community of interest exists in the instant case among all the employees of the Activity, including those the Activity claims are "professionals." Moreover, Section 10(b)(4) of the Order provides professional employees the opportunity to decide as a group as to whether or not they wish to be included with nonprofessional employees in an appropriate unit. Accordingly, I shall not exclude professional employees, if any, from the unit found appropriate on the basis that they lack a clear and identifiable community of interest with nonprofessional employees.

Based on the foregoing circumstances, I find that the unit sought by the NFFE is appropriate for the purpose of exclusive recognition. Thus, the evidence establishes that the Activity constitutes a distinct administrative and geographic subdivision of the Bureau of Land Management; that the District Manager exercises initial decision-making authority over, and has responsibility for, the disposition of public lands within the District; that the District Manager exercises substantial control over personnel in the District; and that there are uniform personnel policies and programs for the employees within the claimed unit. 4/

4/ Cf. Department of the Interior, Bureau of Land Management, Riverside District and Land Office, A/SLMR No. 170.

Eligibility Issues. 5/

Temporary or "Seasonal" Employees

The Activity asserts that certain employees classified as "temporary" or "seasonal" have a reasonable expectancy of future employment and should be included in the unit. In this connection, the record reflects that between 30 and 35 individuals are hired each year as firefighters for the months of June through September. These employees are, for the most part, college students, and the evidence establishes that in the past some of these individuals have been hired upon graduation as permanent employees. The record indicates that 22 of the 31 employees hired to begin work on June 1, 1972, worked in the same jobs the previous summer. Of these 22 employees, 9 worked also during the summer of 1970, and 7 worked during the summer of 1969. The record reflects that these employees perform the same work as certain other Activity employees, receive annual leave rights, have their service credited for the purpose of tenure and are subject to the same personnel policies as other Activity employees. Because the record shows that the majority of these "seasonal" or "temporary" employees will have worked during two or more seasons as of September 1972, I find that they have a reasonable expectancy of future employment and thus manifest a substantial and continuing interest in the terms and conditions of employment along with the permanent employees. Under these circumstances, I am persuaded that they share a community of interest with other Activity employees and, therefore, should be included in the unit. 6/

I am advised administratively that the NFFE's showing of interest was adequate at the time its petition was filed in this matter. In applying showing of interest requirements to a seasonal

5/ The parties stipulated, and the record supports, that employees who occupy the positions of District Manager, Division of Resource Management Chief, Division of Administration Chief, Division of Operations Chief and the three Area Managers are supervisors and/or management officials within the meaning of the Order. I, therefore, shall exclude them from the unit found appropriate.

6/ See United States Department of Agriculture, Forest Service, Schenck Civilian Conservation Center, National Forests of North Carolina, A/SLMR No. 116; United States Department of Agriculture, Forest Service, Santa Fe National Forest, Santa Fe, New Mexico, A/SLMR No. 88.

The parties stipulated that "casual" employees should be excluded from the unit. Based on record evidence that "casual" employees are hired only to fight a particular fire and are terminated at the end of the fire, I find that "casual" employees have no reasonable expectancy of future employment and should be excluded from the unit.

operation in the Federal sector, I find that an adequate showing of interest may be established based on the number of employees employed in the unit at the time a representation petition is filed. 7/

Fire Control Technician.

The Activity contends the Fire Control Technician, GS-9, should be excluded from the unit as a supervisor. The NFFE contends that as the employee occupying this position acts as a supervisor only four months out of the year, he should be included in the unit.

The record reflects that for the period from June through September each year the employee occupying this position acts as the supervisor for the 30 to 35 "temporary" firefighters discussed above. During the rest of each year, he has no management or supervisory duties other than helping to prepare the Fire Plan for the coming year. In my opinion, a "seasonal supervisor" who spends a portion of the working year, such as the eight months here involved, as rank-and-file employee and the remainder of the year as a supervisor, should be included in an employee bargaining unit during the "out of season" period when he is performing rank and file duties. Further, such an individual should be deemed eligible to vote in an election providing that he is not in a supervisory status at the time of the election. Under these circumstances, I find that the voting eligibility of the Fire Control Technician, GS-9, should be determined in accordance with the above stated principle. 8/ However, he would be included in the unit only during the period in which he exercises no supervisory duties.

Confidential Employees.

The parties stipulated that the Secretary to the District Manager, is a "confidential" employee and should therefore be excluded from the unit. The record reflects that the employee in this classification

7/ My decision in this regard with respect to "seasonal" employees and the effect of their inclusion in the claimed unit on the prescribed showing of interest would not apply to the showing of interest requirements in units which properly include nonseasonal, less than full-time employees, who share a community of interest with full-time employees.

8/ My finding herein is limited solely to a "seasonal supervisor" who performs supervisory functions full-time during a period of the work year. With respect to employees who perform supervisory functions part of each day or week, or fill in sporadically for a full-time supervisor, the facts of each case shall determine their supervisory status.

is the District Manager's personal secretary, serves as the personnel assistant for the District, and is the individual responsible for various types of confidential records. The evidence establishes also that the Secretary to the District Manager would be involved in a confidential capacity to the District Manager when the latter is fulfilling his role in labor-management matters. Under the foregoing circumstances, I find that the Secretary to the District Manager is a confidential employee and should be excluded from the unit found appropriate.

Professional Employees.

The parties stipulated that some 9 employees in 6 classifications were "professional" employees within the meaning of the Order. The 6 classifications involved were Realty Specialist, Range and Watershed Specialist, Wildlife Biologist, Range Conservationist, Forester, and Civil Engineer. All of these classifications, with the exception of Civil Engineer, appear on the Bureau of Land Management career ladder for natural resource management specialties with an entry level of GS-5 and a journeyman level of GS-9.

The record reveals that a Realty Specialist, GS-11, is responsible for matters pertaining to applications for use of the public lands. Included in these duties are appraisal functions to determine the value of the lands involved in various transactions in order that the Activity may make proper charges for rights of way, applications, etc. The Realty Specialist is the only one of the claimed "professional" designations for which the Activity submitted a job description. No particular educational requirements are set out in the job description for the journeyman Realty Specialist position. However, the Realty Specialist, GS-11 is required to have successfully completed the American Institute of Real Estate Appraiser Course. In Department of the Interior, Bureau of Land Management, Riverside District and Land Office, cited above, I set forth the criteria for determining whether or not an employee qualified as a professional within the meaning of the Order. In that case, I determined that a Realty Specialist of the Bureau of Land Management was not a professional employee based on the view that while the position occupied by the Realty Specialist requires the exercise of some discretion and judgment, it is not required that he have knowledge of an advanced type in a field of science or learning. Rather, the position requires only a general academic education supplemented by a six month training course and on-the-job training. As the record in the subject case does not indicate that the Realty Specialist of the Activity herein has different duties or is subject to any substantially different educational and job requirements than the Realty Specialist at the Riverside District Office, I find the Realty Specialist employed in the Lakeview District Office is not a professional employee within the meaning of the Order.

The duties of the Range and Watershed Specialist run from being the technical specialist for the District on all range and watershed

matters to the interpretation and review of manual releases and instruction memoranda. He assists the Area Managers in the development of land allotment management plans; in resolving particular problems related to his speciality; and when available, he provides the Area Managers with manpower assistance. In carrying out his duties, the Range and Watershed Specialist uses his own initiative, resources, and judgment. While the record does not reveal the educational requirements for the position of Range and Watershed Specialist, the record reflects that the employee occupying this position at the Activity has a Bachelor's degree in Range Conservation.

An employee in the classification Wildlife Biologist is in the same classification series as an employee classified as a Wildlife Management Specialist, whom I found not to be a professional in Department of the Interior, Bureau of Land Management, Riverside District and Land Office, cited above. The record reveals the individual occupying the position of Wildlife Biologist at the Activity has a Bachelor's degree in Range Management and a Master's degree in Wildlife Management. The record reveals further that the required duties of this position are similar to those of the Range and Watershed Specialist except that a Wildlife Biologist's job functions are related to wildlife problems. In this connection, he assists the Area Managers in evaluating such wildlife problems as the need to improve wildlife habitat, restrictions necessary in resource use plans to benefit wildlife, and the review of proposals for the use of pesticides to determine possible adverse impact on wildlife. The recommendations made by the employee occupying this position are not reviewed at the district level from a technical standpoint, but only from a management standpoint.

There are four employees of the Activity designated as Range Conservationists, three of whom are at GS-9 level and one at the GS-7 level. They are in the same classification series as the Range and Watershed Specialist discussed above. The record reflects that one of these employees has a Bachelor of Science degree in Agronomy and that at least one of the others has a Bachelor of Science degree in Range Management. The record reveals that although the nature of their duties vary somewhat from one geographical area to another because of the different physical makeup of the various areas, Range Conservationists are responsible essentially for the protection and proper usage of the range and grazing lands. They have the responsibility for developing management plans for various land allotments assigned by the Area Managers. In this connection, they analyze the capability of range areas, the objectives sought in the management of livestock in the area and the objectives of the management plan for that particular allotment of land. To determine the objectives of this plan, Range Conservationists have to take into consideration such matters as watershed stabilization, the wildlife habitat, the livestock forage requirements, and other factors which might affect the

environmental equilibrium in that land allotment. The management plan, when completed, is subject to review by the Area Manager and, ultimately, by the District Manager.

The employee designated as a Forester in the Lakeview District Office has a Bachelor of Science degree in Forestry and is responsible to the Area Manager of the Lost River Area for development of timber sale plans within the guidelines set by the State Office and the Area Manager. 9/ In developing the timber sale plan, the Forester selectively chooses the trees to be cut; appraises the value of the timber; and supervises the sales contract to make sure that all the contract stipulations are met. He has no day-to-day supervision in accomplishing these tasks, but he must submit his timber sale plan to the Area Manager for approval. Normally, the plan submitted by the Forester is adopted by the Area Manager and given final approval by the State Office.

The remaining employee classification designated as a "professional" by the Activity is the classification "Civil Engineer." The individual employed by the Activity in this classification is a GS-9, and has been rated eligible as a Highway Engineer by the Civil Service Commission. The record reveals that the employee in question does not have a college degree and that his rating as a Highway Engineer was attained on the basis of some college work, experience, and his score on an examination. The Activity contends that notwithstanding the Civil Engineer's limited educational background, this job classification is traditionally accepted as a professional position. However, minimal evidence was adduced as to the actual job requirements or duties of the employee involved.

In my view, the foregoing record does not provide an adequate basis upon which to make a determination regarding the professional status of the following employee classifications: Range and Watershed Specialist, Wildlife Biologist, Range Conservationist, Forester, and Civil Engineer. Thus, in the instant case, while the record reflects in certain instances the actual educational background of the alleged "professional" employees in these categories, it does not reflect clearly the educational requirements for incumbents in these categories. Nor does the record reveal whether, if specialized intellectual instruction is within the job description requirements, the product of such instruction is, in fact, utilized in performance of the particular

9/ The record discloses that the Lost River Area has the only significant stand of timber in the District and, therefore, has the only Forester.

work involved. 10/ Moreover, the limited description of the work performed by these employees does not clearly indicate that the other criteria necessary for professional status set forth in Department of the Interior, Bureau of Land Management, Riverside District and Land Office, cited above, are fully met by any of the employees in these classifications. If these employees are not professional employees within the meaning of the Order it would follow that a separate self-determination election would not be warranted. As I cannot determine on the basis of the record adduced in the subject case whether the petitioned for unit contains professional employees, I shall remand the subject case to the appropriate Regional Administrator for the purpose of reopening the record in order to secure additional evidence, as discussed above, concerning the professional status of the aforementioned employee classifications in the Lakeview District Office of the Bureau of Land Management.

ORDER

IT IS HEREBY ORDERED that the subject case be, and it hereby is, remanded to the appropriate Regional Administrator.

Dated, Washington, D. C.
October 30, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

10/ In A/SLMR No. 170, I found that employees with the designation of Range Conservationist and Wildlife Management Specialist were not professionals because the evidence in that case established that neither of these job designations required a prolonged course of specialized intellectual instruction or study. Rather, these positions required a general academic education supplemented by experience and on-the-job training. The record herein does not contain either the job descriptions or other evidence of the educational requirements for the similar employee classification Wildlife Biologist or the Range Conservationist.

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

DEPARTMENT OF THE ARMY,
DEFENSE LANGUAGE INSTITUTE,
EAST COAST BRANCH
A/SLMR No. 213

This case involved a clarification of unit (CU) petition filed by the Activity to clarify an exclusively recognized unit represented by the American Federation of Government Employees, Local 2, AFL-CIO (AFGE).

In December 1969 the AFGE was granted recognition for a unit of all nonsupervisory instructors in the East Coast Branch of the Defense Language Institute. At the time of recognition only permanent instructors were employed, but subsequently the Activity hired "Not-to-Exceed" (NTE) and "When-Actually-Employed" (WAE) instructors. The AFGE would include such employees on the ground that the unit language encompasses temporary as well as permanent employees.

The Assistant Secretary noted that the NTE employees teach specified courses for a set duration, have some of the same benefits as permanent employees, are appointed for one-year terms, have been reappointed to longer terms on several occasions since NTE's were first employed in 1970, and may be considered to have a reasonable expectation of future employment. In these circumstances, he found that the NTE employees share a clear and identifiable community of interest with permanent employees and were within the classifications contemplated in the exclusive recognition.

With respect to the WAE employees, the Assistant Secretary concluded that the record is clear that such employees are employed sporadically and are hired only for contingencies that cannot be foreseen. Thus, the WAE employees fill in for other instructors in the event of illnesses or other unforeseen occurrences, they are not assigned regular classes, share no common benefits with other employees, are paid only when actually employed, and, generally, do not have a reasonable expectation of future employment.

Accordingly, the Assistant Secretary found it appropriate to clarify the existing unit to include the NTE employees, and to exclude the WAE employees.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,
DEFENSE LANGUAGE INSTITUTE,
EAST COAST BRANCH

Activity-Petitioner

and

Case No. 22-2878(CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2, AFL-CIO 1/

Labor Organization

DECISION AND ORDER CLARIFYING UNIT

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

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

The Activity-Petitioner, Department of the Army, Defense Language Institute, East Coast Branch, herein called DLI, filed a clarification of unit petition (CU) in the subject case seeking clarification of an existing exclusively recognized bargaining unit. 2/ Specifically, DLI seeks a determination that the recognized unit consists only of some 29 permanent employees and does not include some 22 "Not-To-Exceed" (NTE) and some 9 "When-Actually-Employed" (WAE) instructors. In this connection, DLI contends that although the unit description for the recognized unit includes "all" instructors, the parties did not contemplate the inclusion of NTE and WAE employees in the recognized unit as no such employees were employed at the time of recognition. It contends also that instructors in the NTE and WAE categories do not share a clear and identifiable community of interest with permanent instructors. Thus, DLI proposes that the unit description be modified expressly to exclude NTE and WAE instructors.

The AFGE takes the position that the existing exclusively recognized unit includes all instructors, whether permanent employees or otherwise; that the NTE and WAE employees were intended to be included in the recognized unit; that it would be unconscionable to exclude 52 percent of a bargaining unit, which the proposed clarification would do; and that all DLI instructors should be included in the unit in view of the similarities in their supervision, working conditions and benefits.

The record reflects that DLI is an organization of the Department of Defense, under the administrative control of the Department of the Army. Its mission is to conduct foreign language training programs for selected military and civilian personnel and to provide the necessary logistical support directly related to this training. The unit involved herein covers those personnel who conduct the language training necessary to the mission of East Coast Branch of DLI.

There are three categories of instructors currently employed by DLI at its East Coast Branch. One category is composed of the permanent employees whose employment is not limited to a fixed period and who all parties agree are within the exclusively recognized unit. The remaining two categories of employees DLI would exclude from the recognized unit are the NTE employees who are hired for fixed periods not to exceed one year, but whose appointments may be renewed for the length of time that they are needed, and the WAE employees who are paid only when they actually work. 3/

The NTE employees usually are appointed for one year terms but, as noted above, may be reappointed for extended terms should the needs of the Institute so require. The record also discloses that such employees are hired for definite periods to teach specific courses of set durations and are notified at the beginning of the school year of their employment. Although there are no provisions for NTE appointments to be converted to permanent status, the evidence reveals that while they are employed such employees have a regularly scheduled workweek of 40 hours, work alongside the permanent instructors on a regular basis, and are required to teach one or more courses. Also, in common with permanent employees, NTE employees receive annual and sick leave as well as holiday benefits, although they do not receive promotion or step increases.

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

2/ On December 15, 1969 exclusive recognition was accorded to the American Federation of Government Employees, Local 2, AFL-CIO, herein called AFGE. The exclusively recognized unit was composed of "all non-supervisory professors, associate professors and instructors" employed by the DLI, East Coast Branch.

3/ The record reflects that while all employees meet basically the same educational requirements, are similarly supervised, and are held to the same standards, only the permanent employees have life and health insurance benefits, retirement benefits, rights in reduction-in-force situations, severance and moving pay, as well as full grievance procedure rights.

The record further reveals that NTE employees have a reasonable expectation of future employment as evidenced by the fact that several of them have been reappointed after their one year term has expired. 4/

The record indicates that WAE employees, unlike those in the NTE category, are, in actuality, substitute instructors who neither have set courses to teach nor fixed schedules of classes. They are available to fill in for any permanent or NTE instructors who fall ill or for some reason are unable to teach class for a certain period or in other emergency situations. WAE employees are paid only when they actually work and, at other times, are free to work elsewhere. They do not have to be on call or prepared to report for duty at any time. If such employees are not available, this is not held against them, and if they are available, as noted above, they get paid for the time they actually work. They may work, as the need arises, for a week, a day, or an hour. In sum, WAE employees are employed on an intermittent or sporadic basis and, consequently, have no reasonable expectation of future employment. 5/

Based on the foregoing circumstances, I find that NTE employees share a clear and identifiable community of interest with the permanent employees in the unit sought to be clarified and are within the classifications contemplated in the exclusive recognition. Thus, the evidence establishes that employees in the NTE category teach specified courses for a set duration, have some of the same benefits as permanent employees, are appointed for one-year terms, and have been reappointed to longer terms on several occasions since NTE employees were first employed in 1970.

However, with respect to WAE employees, the record is clear that such employees are employed sporadically and are hired only for contingencies that cannot be foreseen. Thus, as noted above, the evidence establishes that WAE employees fill in for permanent or NTE instructors in the event of illnesses or other unforeseen occurrences. They are not assigned regular classes, are held to no schedule, are not held responsible for unavailability for work, share no common benefits with other employees, are paid only when actually employed and, generally, do not have a reasonable expectation of future employment. 6/

In these circumstances, I find that the existing unit should be clarified to include NTE employees, and to exclude WAE employees.

4/ Thus, the evidence establishes that since 1970, when NTE's were first employed, four NTE's were reappointed after their initial term of employement had expired.

5/ WAE employees receive no fringe benefits.

6/ Although the record reveals that one WAE employee was upgraded to an NTE classification, it also discloses that such employee was upgraded because of a continued expectation of employment which could be attained only in the NTE classification.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, in which exclusive recognition was granted on December 15, 1969 to American Federation of Government Employees, Local 2, AFL-CIO, located at the Department of the Army, Defense Language Institute, East Coast Branch, Washington, D. C., be, and hereby is, clarified by including in the said unit, all permanent and Not-To-Exceed (NTE) instructors, and by excluding from the said unit When-Actually-Employed (WAE) instructors.

Dated, Washington, D.C.
October 30, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

October 30, 1972

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

INTERNAL REVENUE SERVICE,
OFFICE OF THE DISTRICT DIRECTOR,
JACKSONVILLE DISTRICT,
JACKSONVILLE, FLORIDA
A/SLMR No. 214

This proceeding arose as a result of an unfair labor practice complaint filed by the National Association of Internal Revenue Employees, Jacksonville District Joint Council and the National Association of Internal Revenue Employees (NAIRE). The complaint alleged that the Respondent violated Section 19(a)(6) of the Executive Order by refusing, upon request, to furnish NAIRE with the home addresses of all employees in the bargaining unit for which NAIRE had been duly certified as exclusive bargaining representative. In denying that it had violated the Executive Order, the Respondent contended that NAIRE was not entitled to the home addresses of the unit employees for two principal reasons: (1) the home addresses of the unit employees were not necessary and relevant to the fulfillment of NAIRE's bargaining obligations as the evidence established that NAIRE had adequate means by which it could communicate effectively with unit employees; and (2) assuming that NAIRE had demonstrated that the addresses of the unit employees were relevant and necessary to fulfilling its bargaining obligations, the Regulations of the Civil Service Commission precluded the Assistant Secretary from ordering the release of such home addresses to NAIRE. The United States Civil Service Commission, which was permitted to intervene in the proceedings, joined the Respondent in the latter contention.

Upon the completion of the hearing and the filing of briefs by all of the parties involved, the Hearing Examiner issued a Report and Recommendations dismissing the complaint in its entirety.

Exceptions and supporting brief were filed by the Complainant with the Assistant Secretary who, after considering the entire record, adopted the Hearing Examiner's recommendations.

The evidence revealed that the bargaining unit is composed of 19 separate posts of duty scattered throughout the State of Florida. It further revealed that a substantial number of the unit employees spend from about 50 to 90 percent of their work time on field assignments and that less than half the bargaining unit employees are members of NAIRE. In this context, NAIRE claims that the home addresses of the unit employees are essential for it to be able to communicate effectively with the unit employees.

It was concluded that NAIRE had failed to establish that it lacked an effective means of communicating with employees in the bargaining unit. Thus, the evidence revealed that under the provisions of the parties' current negotiated agreement NAIRE had the right to distribute literature within Respondent's offices during non-duty hours; the right to use space on the Respondent's premises for meetings with unit employees during lunch hours and after work hours; and the right to use bulletin board space on Respondent's premises. The evidence further revealed that Respondent had agreed to furnish NAIRE with a quarterly list containing the names and positions of all unit employees and to provide each new employee with a NAIRE self-addressed and postage-paid card so that the new employee could advise NAIRE of his home address. Moreover, it was established that NAIRE had made no attempts to use all of the communication channels available to it and that although it had at least one steward at each duty post, it had not attempted to have its stewards solicit the home addresses of the unit employees.

In view of the basis for his decision in this matter, the Assistant Secretary found it unnecessary to consider other issues raised in the case, including the issue as to whether Civil Service Regulations prohibited the Assistant Secretary from directing the Respondent to furnish NAIRE with the requested employee addresses.

500-836 O - 73 - 34

A/SLMR No. 214

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE,
OFFICE OF THE DISTRICT DIRECTOR,
JACKSONVILLE DISTRICT,
JACKSONVILLE, FLORIDA

Respondent

and

Case No. 42-1505 (CA-26)

NATIONAL ASSOCIATION OF INTERNAL
REVENUE EMPLOYEES, JACKSONVILLE
DISTRICT JOINT COUNCIL AND THE
NATIONAL ASSOCIATION OF INTERNAL
REVENUE EMPLOYEES

Complainant

and

UNITED STATES CIVIL SERVICE COMMISSION

Intervenor

DECISION AND ORDER

On May 19, 1972, Hearing Examiner Frank H. Itkin issued his Report and Recommendations in the above entitled proceeding finding that the Respondent, Internal Revenue Service, Office of the District Director, Jacksonville District, had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions to the Hearing Examiner's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Hearing Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Hearing Examiner's Report and Recommendations and the entire record in this case, 1/ including the exceptions and a supporting brief filed by the Complainant, I hereby adopt the findings, conclusions, and recommendations of the Hearing Examiner. 2/

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 42-1505 (CA-26) be, and it hereby is, dismissed.

Dated, Washington, D. C.
October 30, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

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1/ In view of my decision herein, I find it unnecessary to consider the contention of the Intervenor, United States Civil Service Commission, that the Assistant Secretary is barred by certain Civil Service Commission Regulations, as clarified in the Federal Personnel Manual, from ordering the Respondent to furnish the Complainant with the addresses of the employees in the bargaining unit. My decision herein should not be construed to mean that I necessarily agree with the contention of the Intervenor.

2/ In adopting the decision of the Hearing Examiner, it was noted that the evidence revealed that the Complainant has several means in which to communicate with the unit employees, including the distribution of literature during non-work time to the desks of employees. However, I do not adopt the finding of the Hearing Examiner to the extent that he implies that where an exclusive bargaining representative has several different means in which to communicate with the employees it represents, each of which alone may be inadequate to provide effective communication, the cumulative effect of the various means available may nevertheless provide the exclusive representative with an adequate means of communicating with unit employees.

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

Internal Revenue Service
Office of the District Director
Jacksonville District
Jacksonville, Florida

Respondent

National Association of Internal Revenue Employees Jacksonville District Joint Council and the National Association of Internal Revenue Employees

Case No. 42-1505(CA-26)

Complainant

United States Civil Service Commission

Intervenor.

Robert M. Tobias, Esquire,
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Before: Frank H. Itkin, Hearing Examiner

REPORT AND RECOMMENDATIONS

Statement of the Case

This proceeding arises under Executive Order 11491. It was initiated by a complaint filed on March 12, 1971, by National Association of Internal Revenue Employees Jacksonville District Joint Council and the National Association of Internal Revenue Employees (herein, "NAIRE" or "the Complainant"). The complaint alleges that Internal Revenue Service, Office of the District Director, Jacksonville District, Jacksonville, Florida (herein, "IRS" or "the Respondent"), violated Section 19(a)(6) of the Executive Order by refusing upon request to furnish NAIRE with the home addresses of all employees in the bargaining unit for which NAIRE had been duly certified as the exclusive bargaining representative. On August 20, 1971, a notice of hearing on the complaint was issued by the Acting Regional Administrator for the Atlanta Region of the Labor-Management Services Administration, United States Department of Labor. The hearing was conducted before me on October 14, 1971, at Jacksonville, Florida. All parties were represented by counsel 1/, who were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, submit oral argument and file briefs. 2/

Upon the entire record in this matter, from my observation of the witnesses, and other due consideration of the briefs filed by all parties, I make the following

Findings of Fact

I. Introduction; the contentions of the parties

On April 21, 1970, NAIRE, the Complainant, was duly certified as the exclusive bargaining representative for a unit including "All non-supervisory professional and non-professional employees in the Jacksonville District of the Internal Revenue Service * * *." The parties thereafter participated in a number of bargaining sessions and on December 14, 1970, entered into a collective bargaining agreement. On January 8, 1971, counsel for NAIRE sent the following letter to the District Director:

1/ On August 17, 1971, the Civil Service Commission (herein, "CSC" or "the Intervenor") moved to intervene in this proceeding. On August 19, 1971, the Acting Regional Administrator granted the motion to intervene.

2/ Briefs were filed by NAIRE, IRS and CSC.

* * *

I am writing this letter on behalf of the NAIRE Jacksonville District Joint Council to request, in addition to the presently supplied information concerning employees of the Jacksonville District, all home addresses of the employees included in the unit of exclusive recognition.

The information requested is necessary in order to solicit the employees' views on future contract proposals and preferences, to inform the employees concerning present benefits recently negotiated, to encourage participation in the policing and enforcing of the collective bargaining agreement, and to plumb their thoughts on the wisdom of union support of various legislative proposals.

As you are well aware, the employees in the Jacksonville District of the Internal Revenue Service are assigned to twenty separate posts of duty making personal contact at home virtually impossible.

We believe the requested information is necessary and relevant to the effective administration of the present collective bargaining agreement. Therefore, we request that the information be forthcoming at your earliest convenience.

* * *

On January 27, 1971, the District Director responded to NAIRE's counsel, as follows:

* * *

As you recall, during the negotiations which ended December 14, 1970, with a signed agreement, NAIRE requested a list of employees containing the names, position titles, and home addresses of all employees in the unit covered. It was agreed that we would provide NAIRE with the names, position titles, and posts-of-duty of employees in the unit. In return, NAIRE agreed to withdraw the demand of providing home addresses of employees. This issue was resolved during negotiations.

NAIRE was also informed that Federal Personnel Manual 294-C-2(3) and Treasury Personnel Bulletin No. 66-26 prohibit providing the information requested. The Federal Personnel Manual states "Agencies should not comply with requests from employee organizations for lists of home addresses or home telephone numbers of employees."

* * *

Section 19(a)(6) of the Executive Order provides that "Agency management shall not * * * refuse to consult, confer, or negotiate with a labor organization as required by this Order." The question presented is whether, under the circumstances present here, Respondent IRS violated Section 19(a)(6) by refusing to provide NAIRE with the home addresses of all the unit employees. NAIRE, relying principally upon decisions under the National Labor Relations Act, argues inter alia that IRS violated its bargaining obligation under the Executive Order by refusing to furnish the home addresses of the unit employees to their collective bargaining agent 3/; that IRS has shown no reasonable justification for withholding the requested information; and that NAIRE has not waived its right to institute and maintain this proceeding because of events attending and resulting in the execution of the collective bargaining agreement.

IRS argues that NAIRE has failed to establish that home addresses of the unit employees are necessary and relevant to the fulfillment of Complainant's bargaining obligation; that, in this respect, NAIRE has more than sufficient means by which to contact unit employees; that the cases decided under the NLRA are not binding and are factually distinguishable from this case; that by failing to utilize the procedures provided in Section 11(c)(4) of the Executive Order pertaining to resolution of negotiability disputes, NAIRE is now precluded from maintaining this complaint 4/; that NAIRE in effect "bargained away" the issue of home addresses and has waived this asserted right; that the special nature of the work of IRS employees precludes a remedy in this case; that providing the requested home addresses "is unduly burdensome for the respondent"; and finally that CSC and Treasury regulations prohibit the release of this requested information.

3/ NAIRE asserts in its brief: "* * * Absent that information, the Union cannot represent the employees effectively and maintain communication with them. * * * In the circumstances of this case, a list of the employees' home addresses will enable the Union to communicate its bargaining or administrative position and aid it in formulating this position. * * *"

4/ Section 11(c)(4) states:

* * *

(c) If in connection with negotiations, an issue develops as to whether a proposal is contrary to law, regulation, controlling agreement, or this Order and therefore not negotiable, it should be resolved as follows:

* * *

(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 or appropriate authority outside the agency, or this Order, or

CSC in turn argues, as follows:

* * *

> To summarize, it is our contention that: (1) The Civil Service Commission's regulations clearly prohibit Federal agencies from furnishing employee home addresses; (2) These regulations are in accordance with the Freedom of Information Act; (3) The regulations carry the same weight and effect as a statute; (4) The regulations are mandatory as compared to guidance issued by the Commission; (5) The Assistant Secretary does not have the authority under the Order to invalidate a Commission regulation; (6) The Charleston decision [A/SLMR No. 1] is distinguishable because there a basic right was involved, i.e., the right to organize, as compared to the administration of an agreement in the instant case, which is not a basic right; (7) The significant differences between Federal employment and private sector employment as well as the dissimilar nature of labor-management relations between the two require a nonapplication of NLRB doctrines.

* * *

The essentially undisputed facts pertaining to these and related contentions are summarized below.

II. NAIRE is certified as bargaining agent for the unit employees; the composition and location of unit personnel

Respondent agency is the Office of the District Director, Jacksonville District, Internal Revenue Service. The District Director's authority and responsibility for the administration of the Internal Revenue Code generally extends throughout the State of Florida. Complainant NAIRE is composed of five local chapters which joined to form the National Association of Internal Revenue Employee Jacksonville District Joint Council in order to represent the IRS employees in the Jacksonville District.

4/ (continued)

> (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.
>
> * * *

On April 13, 1970, a representation election was conducted under the Executive Order. As a result, on April 21, 1970, NAIRE was certified as the exclusive bargaining representative for a unit including "All nonsupervisory professional and non-professional employees in the Jacksonville District of the Internal Revenue Service" and excluding "Management officials, supervisors, employees engaged in Federal personnel work, other than in a purely clerical capacity, guards, and others as defined in the Executive Order."

The Jacksonville District is composed of 19 separate posts of duty. The various posts and approximate number of unit employees at each post are, as follows:

Post of Duty	Unit Employees
Daytona Beach	11
Ft. Lauderdale	71
Ft. Myers	8
Ft. Pierce	5
Gainesville	6
Jacksonville	274
Key West	1
Lakeland	21
Melbourne	10
Miami	227
Ocala	4
Orlando	51
Panama City	9
Pensacola	23
St. Petersburg	40
Sarasota	17
Tallahassee	16
Tampa	52
West Palm Beach	44
	890

The employees working at these 19 posts commute from some 89 separate municipalities. 5/ The geographic distances between these various posts are shown in IRS Exhibit 8.

5/ The above data is more fully recited in Joint Exhibits 1 and 2 and IRS Exhibit 9. These exhibits were withdrawn and substituted in accordance with a stipulation between the parties, dated November 15, 1971. The stipulation and substituted exhibits are hereby incorporated into the record.

I note that IRS Exh. 9 shows a total of 1083 employees in the District and that only 890 persons are in fact unit employees. I note further that Jt. Exh. 2, which reflects the municipalities that employees commute from, appears to be based on the total number of employees in the District and not just the number of unit employees. To the same effect, see the organization data reflected in Jt. Exh. 1.

There are approximately 600 professional employees in the unit, including revenue agents, revenue officers, estate and gift tax attorneys and tax auditors. There are approximately 300 non-professional employees in the unit, including clerks, taxpayer service representatives and revenue representatives. Their "GS" grades range from 2 through 13.

III. NAIRE requests the names and addresses of unit employees during contract negotiations; the provisions of the collective bargaining agreement providing NAIRE with access to the unit employees

NAIRE acknowledges in its brief that it first requested the home addresses, as well as the names, of all unit personnel during contract negotiations. Thus, NAIRE proposed the following contractual clause:

* * *

Article X, Section 3 - Employee Lists

A. The Employer agrees to furnish quarterly to the Union a list of employees which shall contain the names, position titles, and home addresses of all employees in the unit covered.

* * *

Management, in turn, proposed the following:

Section 3 - Employee Lists

A. The Employer agrees to furnish quarterly to the Union for its internal use only, a list of employees which shall contain names and the position titles of all employees in the unit covered so long as the Employer receives such a list from the IRS Data Center.

The parties agreed upon IRS's proposal as quoted above. 6/

6/ During the negotiations, IRS declined to furnish home addresses of the employees for a variety of reasons including its assertion that CSC and IRS regulations forbid such disclosure. As Robert Metheny, chief spokesman for IRS, credibly testified:

* * *

Hearing Examiner: * * * You, of course, wouldn't have been able to give that with the regulations being what they are, would you?

The witness: That's right. We had no option in the matter.

(Continued)

In addition to the foregoing, the parties agreed upon the following contractual provisions:

* * *

ARTICLE X

FACILITIES AND SERVICES

Section 1 - Meeting Facilities

A. It is agreed that, upon advance request of the Union, the Employer will provide meeting space for meetings after hours if such space is available. It is agreed that the Union will comply with all security and housekeeping rules in effect at that time and place.

B. The Employer agrees to provide, upon request, and when available, meeting space for use by a Union representative designated by an aggrieved employee, and the aggrieved employee, for the preparation of grievances pursuant to either the grievance procedure contained herein, adverse actions or appeals during duty hours as set forth in Internal Revenue Policy Statement 1910-2.

C. A NAIRE National Representative upon reasonable advance notice may visit Jacksonville District Posts of Duty between the hours of 11:30 a.m. and 1:30 p.m. to discuss appropriate Union business with employees who are members of the Unit provided such discussions are during the non-duty hours of the employee(s) involved and take place in non-work areas.

Section 2 - Bulletin Boards and Distribution of Materials

A. The Union agrees that material furnished for posting on the Bulletin Board will not reflect on or attack the integrity or motives of any individuals, other unions, agencies or activities of the Federal Government. The Union accepts responsibility for adhering to the requirements of Treasury

6/ (continued)
IRS's other asserted reasons for refusing to agree to make disclosure of the home addresses during the bargaining sessions include, inter alia, (1) "if the employee wanted to furnish them, then the Union should contact the employee and give him that option"; (2) the "personal safety of the employees particularly [in] our enforcement area"; (3) "there are numerous access provisions in the contract that would provide the Union with the information that they sought"; and (4) the "administrative problem of collecting [the] information."

Personnel Manual covering any material posted on Bulletin Boards. In the event the Union fails to adhere to the foregoing as determined by the Employer, the Employer may require that any subsequent items be submitted by the Union to the Employer for review and approval before posting.

B. The Employer agrees to designate one-fourth (1/4) of each official Bulletin Board for the exclusive use of the Union under a printed subject heading entitled NAIRE, Jacksonville District Council, with the appropriate chapter number.

C. Distribution of literature by the Union in the offices of the District will be permitted only before and after scheduled working hours or during the non-duty hours of the employees distributing and receiving it.

* * *

[Section 3 is quoted above.]

* * *

Section 4 - Notice to Incoming Employees

The Employer agrees to distribute to each incoming employee within the Unit for which the Union is the exclusive representative an announcement card furnished by the Union printed as follows:

NATIONAL ASSOCIATION OF INTERNAL REVENUE EMPLOYEES

NAIRE JACKSONVILLE DISTRICT COUNCIL

The exclusive employees' representative for eligible employees in the non-supervisory unit is Jacksonville District Council of the National Association of Internal Revenue Employees (commonly known as "NAIRE"). So that NAIRE Jacksonville District Council may provide maximum service to employees, NAIRE invites you to furnish the following information on this self-addressed and postage-paid card:

NAME:_____
LAST MIDDLE FIRST

ADDRESS:_____
NUMBER STREET CITY STATE

SS NO._____ HOME PHONE:_____

DIVISION:_____ BRANCH:_____

NAIRE MEMBER:_____ YES:_____ NO:_____

DUES PAID BY _____ WITHHOLDING:_____ CASH:_____

NAIRE INSURANCE:_____ LIFE:_____ ACCIDENT:_____ INCOME:_____

NAME OF SPOUSE:_____

Section 5 - Copies of Agreement

A. A copy of this Agreement shall be printed and given to all present and future employees in the Unit and employees will be advised by the Employer to familiarize themselves with the contents of the Agreement. During the orientation training provided to newly-hired employees, a representative of the Employer will distribute Internal Revenue Service Document No. 5475, "Employee-Management Cooperation Program," or any successor document, and verbally explain the Union's status as exclusive representative of employees in the Unit. In addition, the Employer will announce that a Union representative is available to answer questions during non-duty hours.

B. The Employer will provide 100 copies of the published Agreement to the Union.

* * *

The Agreement further provides (Article VI, Section 2) that the Employer "agrees to recognize not more than 22 employees designated by the Union as representatives." There are presently 22 such stewards, at least one for each of the 19 posts of duty. The larger posts have two stewards. The ratio of union representatives or stewards to unit employees is therefore approximately one representative or steward to 40 employees.

IV. The testimony of Complainant's witnesses pertaining to NAIRE's access to unit employees

Orville W. Guinn testified at length with respect to NAIRE's access to unit employees. Guinn previously served as president of Complainant's local chapter in Jacksonville and presently is serving as chairman of the Jacksonville District Joint Council. Guinn, in addition to relating generally the essentially undisputed factual matter recited supra, explained that Complainant has about 427 active members and about half of the active members are employed at the Jacksonville post of duty. Guinn further explained that Complainant publishes a newspaper ("Flemco"), copies of which are mailed to the homes of members and generally made available for employees to "pick up" at their duty station in Jacksonville. 7/

Guinn testified that the current collective bargaining agreement provides for consultation between the parties, but only five union representatives are permitted to attend such sessions. (See Exh. U-1, Art. XX, pp. 22-23.) Guinn, referring to the grievance provisions in the agreement (Exh. U-1, Art. X, Art. XVIII, pp. 8, 16-20), testified that the agreement does not allow the Union's administrative personnel compensable time to investigate a grievance prior to the actual filing of such grievance. Further, Guinn related that the Complainant does not have the right to make distribution to personnel through the IRS mailroom facilities in the Jacksonville District. And, Guinn related that there is no method for polling non-members and, assertedly, it would be "helpful to be able to poll the members and non-members concerning proposed" contractual provisions, the subject matter of consultations and related topics.

In addition, Guinn explained that the headquarters for the Jacksonville post is located within a federal building in Jacksonville consisting of some ten floors; that unit personnel are scattered on a number of the floors; and, in Guinn's view, a majority of the personnel in the building eat their lunch meal outside of the facility. Further, as for union meetings, Guinn related that the Jacksonville chapter has quarterly meetings; however, he explained that only 13 members in fact attended the last meeting.

On cross-examination, Guinn acknowledged that during the organizational campaign resulting in NAIRE's certification, NAIRE distributed campaign literature to employees throughout the District; that the Union's national president or other representatives visited most of the posts and he or the other NAIRE officials conducted off-site luncheons with

7/ Guinn noted that extra copies of Flemco are "plac[ed] *** on a desk or something like that" so employees "can pick them up."

employees; and that distribution of organizational literature was permitted on the premises of IRS facilities. Guinn did not dispute the fact that distribution of organizational literature was generally permitted before duty hours, during lunch periods and after duty hours in the offices and on the desks of the employees at the various posts of duty. Guinn also recalled that since execution of the contract, there has only been one formal consultation meeting with management on June 29, 1971, and that no request was made at that meeting for home addresses of unit employees (See IRS Exh. 4, a summary of the minutes of the consultation meeting). 8/ Guinn testified that he has never requested use of IRS facilities under the terms of the agreement (Section 1, Art. X); that he has received lists of employees quarterly pursuant to Section 3, Art. X, of the agreement; that NAIRE has received in the mail about eight or ten cards (IRS Exh. 5) required to be distributed to new employees pursuant to Section 4, Art. X, of the agreement; that a copy of the agreement has been provided to all employees; and that NAIRE generally may post notices on bulletin boards pursuant to Section 2, Art. X. And, although Naire may not use the mailroom facilities of IRS, it in fact never requested during contract negotiations the right to use these facilities. 9/

Guinn acknowledged that Respondent has never refused to meet with NAIRE; that IRS has approached labor relation problems "in the spirit of cooperation"; and that IRS has never "done anything to oppose the union organization of its employees in Jacksonville." Further, as noted, there is one shop steward at each post of duty and two at the larger posts. Guinn has never asked these representatives to solicit home addresses of unit personnel who are not members of the Union.

Julia Kelty, an IRS revenue officer, testified for Complainant. She related that Exh. U-3, entitled "The Bulletin Board", is published by NAIRE for posting and distribution at the various duty stations; that about four weeks prior to this hearing she asked Leonard Cabe, Respondent's chief of personnel, whether U-3 could be posted; and that Cabe assertedly told her that "he would rather I not post it." 10/ Thereafter, according to Kelty, she never asked Cabe for permission to

8/ Guinn also acknowledged that no request for home addresses of unit employees was made previously during the election campaign.

9/ In its post-hearing brief, NAIRE assets: "A potentially effective means of communication is the use of Respondent's mailing system to deliver notices to the employees. This method is prohibited by the Respondent." As stated, no request for such a contractual provision was ever made by the Union.

10/ Exh. U-3 is headlined, "NAIRE WAGING INTENSE BATTLE FOR FEDERAL EMPLOYEES", and critically discusses, inter alia, the President's announced wage freeze for federal personnel.

post anything at her duty post. 11/ On cross-examination, Kelty was unsure whether Exh. U-3 was the specific subject of her discussion with Cabe or, instead, whether Cabe was referring to some "letter." Kelty acknowledged that Cabe did not "forbid [her] to post anything on the bulletin board," although he assertedly "asked" her not to post a particular document.

Alvin McDaniel, an IRS revenue officer employed at Jacksonville, testified for Complainant that he spends only 10 to 20 percent of his worktime in the office; that he tries to maintain a schedule of being present at his post of duty on Mondays and Fridays for at least a portion of each day in order to meet with taxpayers; that he spends the remaining work time in the field; that there are about 17 other revenue officers at his post of duty and "most of them stay out" as he does; and that all but two of the revenue officers at his post are NAIRE members.

Nickolas Weidner, an IRS agent at Jacksonville, testified that he spends 50 percent of his time in the field; that there are seven other agents in his team or group and they follow similar schedules; that other agents follow similar work schedules; that a particular agent assigned to a special audit team has come into the office two or three times a month during the past two or three years; and that there are a total of some 12 audit teams at the Jacksonville post.

Fred Schilling, an IRS "special agent" at Orlando, testified for Complainant that Exh. U-3 was posted at his station on the bulletin boards for "several days" until he assertedly "was told to take it off." Schilling explained that a Mr. Troubaugh "told [him] to take it down" because "he had received a telephone call from Mr. Leonard Cabe [asking] that [it, the bulletin], be removed." Schilling also testified that he is listed in an Orlando City directory for 1969 and 1971 even though he never gave permission for such a release; that, assertedly, an IRS secretary told him that she had furnished this information to the directory; that he thereafter took steps, partially successful, in stopping this publication and that he complained about the publication to his supervisor. 12/ Schilling further acknowledged that he is executive vice president of NAIRE's local chapter; and that personnel have "distributed [union] literature to the employees of [his] post of duty during non-duty hours to the employees at the office."

11/ Kelty also explained that once every two weeks she generally attempted to have other "Bulletins" distributed to all personnel. Apparently, there were exceptions to this practice.

12/ There are apparently two directories involved and the witness's name and address appeared once thereafter in one of the directories.

V. The testimony of Respondent's witnesses pertaining to NAIRE's access to unit employees

Leonard Cabe, Respondent's chief of personnel at Jacksonville, generally explained the organizational structure and composition of the Jacksonville District. He testified, inter alia, that revenue officers spend approximately 20 percent of their worktime in the office; that various revenue agents spend approximately 30-50 percent of their worktime in the office; that there are revenue agents on the review staff who spend all of their worktime in the office; that there are revenue agents on the conference staff who spend 50-60 percent of their worktime in the office; that tax attorneys spend 50-60 percent of their worktime in the office; and that a large group of clerical employees spend all of their worktime in the office. As Cabe stated: "* * * most of the professional * * * employees that I mentioned generally come in the office once or twice during the week, definitely on payday and definitely at the end of the month for reporting purposes, so they are in the office on certain days." As noted, there are approximately 300 clerical employees and 600 professional employees. The witness, referring to Jt. Exh. 4, explained that there was from April 1, 1970 through March 31, 1971, a 9 percent turnover in technical personnel and a 20 percent turnover in clerical personnel.

Cabe acknowledged that during the organizational campaign, NAIRE's representatives were "allowed to distribute material on the desks of the office of the employees at the various posts of duty before * * * their duty hours, during luncheon hours and after duty hours." Cabe also noted that NAIRE has not utilized the visitation rights provided in Section 1, Part C, of Article X of the agreement, although during the campaign NAIRE's representatives visited the employees at their posts of duty. Further, Cabe identified Exhibits IRS 11 and 12 which explain, inter alia, locations and use of bulletin board facilities. Likewise, Cabe identified Exh. IRS 5 which is the card furnished to new employees pursuant to Section 4 of Article X of the agreement. Cabe testified that management has furnished some 76 cards to new employees since the cards were first supplied by NAIRE. 13/

13/ Cabe also identified Exh. IRS 13, a check list ensuring that management complies with and informs new employees of the pertinent provisions of the collective bargaining agreement. This document recites, inter alia:

* * *

> In addition, please tell the new employees that a Union representative is available to answer questions during non-duty hours.

* * *

Cabe also identified Exh. IRS 14, a manual supplement referring to employee information lists which are prepared and furnished quarterly.

In addition, Cabe identified Exh. IRS 15, an IRS memorandum dated July 30, 1971, which states, in part:

* * *

> Under no circumstances will any official or employee furnish such organizations [city directory organizations] information concerning employees' home addresses, telephone numbers, and sex identification.

Cabe explained that IRS management "has never authorized the release of home addresses" of its personnel. 14/

Finally, Robert L. Metheny, chief of the IRS intelligence division, testified, inter alia, that Section 3 of Article X of the agreement (as well as the other related provisions contained therein and discussed above) was the product of proposals and counterproposals made by the parties at bargaining sessions. Specifically, as for Section 3, the approved language in the agreement is essentially similar to the Union's proposal except, of course, for the elimination of the requested home addresses of employees. Metheny also restated management's reasons for refusing to disclose home addresses and cited Treasury and CSC authority in support of management's position. Further, Metheny testified at length with respect to a large number of alleged threats and assaults against IRS personnel (see IRS Exhs. 31 and 32) And, IRS Exh. 33 indicates the total IRS personnel in Jacksonville District who have either no telephone or maintain an unlisted telephone. However, Metheny could not tell us why various IRS personnel do not have telephones or, in some cases, have unlisted telephones; nor could he show any relationship between the requested disclosure of home addresses of unit personnel to the certified bargaining agent and the large number of threats and assaults upon IRS personnel at home, in the office, or in the field. 15/

14/ Cabe also testified that of the some 887 employees eligible to vote in the April 13, 1970 representation election, 666 voted including some 340 persons who voted by mail ballot. Cabe explained that mail ballots were used in part for convenience and because of "geographical layout" of the unit.

15/ CSC, as noted, also submitted a number of exhibits in support of its various legal contentions. These exhibits were received as CSC 1-9.

Conclusions

I. The controlling principles in the private sector

NAIRE, as stated, relies in substantial part upon decisions under the National Labor Relations Act in support of its claim for the home addresses of all unit employees. Although "not controlling," decisions issued under the NLRA concerning the same or related issues should be taken "into account." See Charleston Naval Shipyard, A/SLMR No. 1, p.3 (1970). In Prudential Insurance Co of America v. N.L.R.B., 412 F.2d 77, 81 (C.A. 2, 1969), cert. denied, 396 U.S. 928, the Court stated in pertinent part, as follows:

> It is now beyond question that the duty to bargain in good faith imposed upon the employer by §8(a)(5) [of the NLRA] includes an obligation to provide the employees' statutory bargaining representative with information that is necessary and relevant to the proper performance of its duties. And this obligation applies with as much force to information needed by the Union for the effective administration of a collective bargaining agreement already in force as to information relevant to the negotiation of a new contract. 16/

The Court went on to state (id. at 83-84) that since a union is under a statutory obligation to represent nonmember employees, as well as members, 17/ the union must be able to communicate, not only at all times, but also with all unit employees. The Court concluded that since "data without which a union cannot even communicate with employees whom it represents is, by its very nature, fundamental to the entire expanse of a union's relationship with the employees," information as to the names and addresses of all employees is deemed relevant to the union's function as bargaining representative without "any special showing of specific relevance * * *" (ibid.)

Under the Prudential rationale, supra, 412 F. 2d at 81-83, resolution of this issue turns on the facts of each case -- namely, whether the record establishes that such information is necessary for the union to communicate with the employees whom it represents. 18/ Thus, for

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16/ Accord: N.L.R.B. v. Acme Industrial Co., 385 U.S. 432, 435-436 (1967); Fafnir Bearing Co. v. N.L.R.B., 362 F. 2d 716, 721 (C.A. 2, 1966).

17/ Humphrey v. Moore, 375 U. S. 335 (1964); Steele v. Louisville & Nashville R. R. Co., 323 U.S. 192 (1944); Standard Oil Company of California, W. O. Inc. v. N.L.R.B., 399 F. 2d 639 (C.A. 9, 1968).

18/ Compare cases holding that information as to the wages of unit employees is "presumptively relevant" to the union's function as bargaining representative. Curtiss-Wright Corp. v. N.L.R.B., 347 F. 2d 61, 68-69 (C.A. 3, 1965); International Tel. and Tel. Corp. v. N.L.R.B., 382 F. 2d 366 (C.A. 3, 1967), cert. denied, 389 U.S. 1039; Boston Herald-Traveler Corp. v. N.L.R.B., 223 F. 2d 58 (C.A. 1, 1955).

example, in Western and Southern Life Insurance Company, 188 NLRB No. 76 (1971), the Labor Board approved the following analysis of its examiner:

* * *

> The Board, with court approval, has held that a collective-bargaining representative is entitled, upon request, to receive from an employer the names and addresses of the employees in the bargaining unit if it has no other effective means of communicating with them. Standard Oil Company of California, Western Operation, Inc., 166 NLRB 343, enfd. 379 F. 2d 639 (C.A. 9); Prudential Insurance Company, 173 NLRB No. 117, enfd. 412 F. 2d 77 (C.A. 2), cert. denied 396 U.S. 938; Southern Counties Gas Company of California, 174 NLRB No. 11; General Electric Company, 176 NLRB No. 84. Respondent contends that the cited cases are distinguishable from the present case in that they involve large, complex units and other circumstances not here present, such as scattered residences, unsuccessful attempts to reach employees by handbilling and no reasonable access to employees at their place of employment. I note, however, that the labor organizations in the cited cases were established representatives with a long history of collective bargaining who were unable nevertheless to communicate effectively with the employees they represented. As a "new" representative, the Union had no established lines of communication with the agents it represented. Thus, it had no contract right to bulletin boards or to communicate with the agents on Respondent's premises. And, as the record shows that agents work out of their homes and report but once a week to their district offices, I find that handbilling and inter-employee contact would not be dependable methods of communication with the employees. For these reasons, and as Respondent conceded that it could without inconvenience supply the Union with the names and addresses of the employees in the bargaining units, I find that it violated Section 8(a)(5) and (1) of the Act by refusing to supply the Union with this information.

And see, United Aircraft Corp., 181 NLRB 892, 902-903 (1970) (and cases cited), enf'd., 434 F. 2d 1198 (C.A. 2, 1970), cert. den., 401 U.S. 993.

Recently, in Shell Oil Company v. N.L.R.B., 79 LRRM 2997 (C.A. 9, 1972), the Court, reversing the Labor Board, held that a company did not violate its bargaining obligation when it refused to comply with a union's request for the names and addresses of all employees in the unit represented by the union. The Court (Judge Byrne concurring) stated:

> We observe at the outset of the discussion of the legal issues involved that the Company has behaved in a reasonable and conciliatory manner throughout while the Union has been demanding, arrogant, and intransigent. It would be most anomalous if, under these circumstances, we were to ratify the Board's determination that the Company, rather than the Union, refused to bargain.
>
> The Board asserts that once information is shown to be relevant to the Union's performance of its role as bargaining representative, this fixes the duty of the Company to produce and any failure to produce is per se an unlawful refusal to bargain. However, this is not the law. Rather:
>
> > "Each case must turn upon its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met." N.L.R.B. v. Truitt Manufacturing Co., 351 U. S. 149, 153-54 (1956).
>
> Cf. Emeryville Research Center v. N.L.R.B., 441 F. 2d 880 (9th Cir. 1971).
>
> Several recent cases have compelled employers to furnish names and addresses of all unit employees when the employees were scattered over a wide geographical area and no practical alternative, other than mailing, existed by which the Union could communicate with the employees. See, e.g., United Aircraft Corp. v. N.L.R.B., 434 F. 2d 1198 (2d Cir. 1970), cert. denied, 401 U. S. 993 (1971); Prudential Insurance Co. v. N.L.R.B., 412 F.2d 77 (2d Cir. 1969), cert. denied, 396 U. S. 928 (1969); Standard Oil v. N.L.R.B., 399 F. 2d 639 (9th Cir. 1968). Cf. Excelsior Underwear, Inc., 156 NLRB 1236 (1966).

* * *

In Shell Oil Company, supra, it was stipulated that the union's "existing means of communicating with the unit employees--handbilling, union meetings, bulletin boards, etc.--were ineffective to reach all unit employees because of the scattered location of respondent's facilities in the unit and the residential dispersion of unit employees." The Court, however, in denying enforcement of the Labor Board's order, stated:

* * *

> To the extent that the Board's decision reflects a determination that there was not a clear and present danger of violence and harassment, it is not supported

by substantial evidence on the record as a whole. As noted above, the stipulation of the parties and uncontradicted testimony establish that there was such danger.

We do not think that a Union duty to safeguard Union membership lists, even when expressed in the Union constitution and even assuming that sanctions would be applied to a failure to safeguard lists of non-Union members, is sufficient to rescue the Board's order.

On this record it would be unreasonable to conclude that the Company was not voicing good faith concern, or that its proposals were not reasonable and serious. It is sufficient to sustain the Company's position that its concern be bona fide and its proposals reasonable and serious.

* * *

Accordingly, assuming that the rationale of the Labor Board should apply here, the question raised is whether, on the facts of this case, NAIRE is entitled to the home addresses of all unit employees because it "has no other effective means of communicating with them" (Western and Southern Life Insurance Company, supra) or, stated differently, "no practical alternative, other than mailing, existed by which the Union could communicate with the employees" (Shell Oil Company, supra).

II. NAIRE's means of communication with the unit personnel

Applying the rationale and principles summarized above, I find and conclude on the facts of this case that Respondent IRS did not violate Section 19(a)(6) of the Executive Order by refusing to disclose to Complainant NAIRE the home addresses of all unit employees. I find and conclude from the essentially undisputed evidence of record recited herein that Complainant NAIRE is not entitled to the home addresses of all unit employees because the Union in fact has "other effective means of communicating with them" (ibid.).

Thus, as shown, NAIRE has about one steward for each 40 unit employees. There is at least one steward at each post of duty in the Jacksonville District. NAIRE receives from IRS quarterly lists of the names and position titles of all unit employees. IRS has agreed to provide NAIRE "upon advance request" with "meeting space for meetings after hours if such space is available." IRS has agreed to provide NAIRE "upon request, and when available, meeting space for use by a union representative * * * for the preparation of grievances * * *." IRS has agreed that NAIRE

representatives "upon reasonable advance notice may visit" the various posts "between the hours of 11:30 a.m. and 1:30 p.m. to discuss appropriate Union business with employees" in the unit, "provided such discussions are during the non-duty hours of the employee (s) involved and take place in non-work areas." Further, IRS has agreed, subject to certain stated limitations, to make available one-fourth of each "official bulletin board for the exclusive use of the Union." And, NAIRE representatives are permitted to distribute notices or literature "in the offices of the District" before and after scheduled working hours and during the non-duty hours of the employees involved. Thus, NAIRE stewards may distribute Union notices or literature to the desks of unit personnel before working hours, during lunch and after duty hours of the personnel involved.

In addition to the foregoing, IRS has agreed to distribute to each new employee a NAIRE "announcement card" which invites the employee to furnish NAIRE with, inter alia, his home address. IRS also has agreed to distribute copies of the collective bargaining agreement to all unit personnel; to provide each new employee with a document entitled "Employee-Management Cooperation Program" and to

* * *

> verbally explain the Union's status as exclusive representative * * *. In addition, the Employer will announce that a Union representative is available to answer questions during non-duty hours.

Further, the Union mails to the homes of its members and makes available for distribution at various duty posts copies of its newspaper Flemco, which is published periodically.

The Union, in its post-hearing brief, argues that a "potentially effective means of communication is the use of Respondent's mailing system to deliver notices to the employees." However, as noted, NAIRE never asked for this additional right at the bargaining sessions. Moreover, NAIRE apparently has failed or declined to utilize many of the means of access provided for in the contract such as, for example, use of IRS meeting facilities and visitation by Union officials at the posts. Further, the record indicates that NAIRE has not attempted through its 22 stewards to obtain the home addresses of non-member unit employees.

NAIRE emphasizes in its brief the limitations and restrictions of the various means of access provided for in the collective bargaining agreement. Thus, handbilling is assertedly ineffective because employees frequently work in the field; distribution of Union notices is permitted only during off-duty hours of the personnel involved; there is a high

turnover of personnel; visitation by NAIRE's representatives to the posts requires advance notice and is limited from 11:30 a.m. to 1:30 p.m., when employees may be away or at lunch; most NAIRE "announcement cards" are not mailed back to NAIRE by new employees; there is poor attendance at Union meetings; and the right to use of the official bulletin boards is not unrestricted. Nevertheless, it is plain that NAIRE principally wants to communicate in writing with the unit employees 19/ and distribution of notices or similar documents can reasonably be made to the desks of the unit personnel by stewards. Moreover, in the context of an employer who concededly has not manifested any anti-union animus, the cumulative result of the various contractual provisions discussed above is to grant NAIRE an "effective means of communicating with" the unit employees.

NAIRE asserts that "factors" present in the Labor Board cases cited above are "similar" or "astonishingly similar to those present in this case." However, a careful reading of the cited Labor Board cases shows that they are factually inapposite. For example, in Prudential, supra, the unit involved some 17,000 employees covering some 34 states; in Western and Southern Life Insurance Co., supra, the union "had no contract right to bulletin boards or to communicate with the agents on Respondent's premises;" and in Shell Oil Company, supra, the parties stipulated that the union's "existing means of communicating with the unit employees * * * were ineffective * * *." In none of these cited cases do we find contractual access provisions equivalent to or substantially similar to those provided for in the instant case.

In sum, I would find and conclude that Complainant NAIRE has failed to prove that Respondent IRS violated its bargaining obligation as alleged. Further, the remaining issues, as recited above, involve novel and substantial questions under the Executive Order. However, in view of my recommendation, it is unnecessary to reach or pass upon these issues at this time.

19/ NAIRE, in its request of January 8, 1971, makes it clear that "personal contact at home" is "virtually impossible." In its brief, NAIRE states: "* * * it would be impossible to visit the employees in their homes * * *."

Recommendation

Upon the basis of the foregoing findings and conclusions, I recommend that the complaint filed herein against Respondent be dismissed. 20/

Frank H. Itkin
Hearing Examiner

Dated at Washington, D. C.
this 19th day of May, 1972

20/ At the close of complainant's case, CSC and IRS moved to dismiss the complaint, I took the motion under advisement and, for the reasons stated herein, would recommend dismissing the complaint.

October 30, 1972

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

U.S. NAVAL REWORK FACILITY,
QUONSET POINT NAVAL AIR STATION,
QUONSET POINT, RHODE ISLAND
A/SLMR No. 215

This representation proceeding involved a severance request by the Petitioner, Operations Analysis Association, No. 011, for a unit of production controllers and electronic technicians in the Operations Analysis Division, Production Engineering Department of the Activity, U.S. Naval Rework Facility, Quonset Point Naval Air Station, Quonset Point, Rhode Island. These employees have been included in a unit, since 1966, represented by the Intervenor, National Association of Government Employees, Local R1-7.

The Petitioner advocated the legitimacy of its request on the grounds that (a) the claimed employees share a significant community of interest; (b) seven groupings of the Activity's employees, one of which contains production controllers in another department and represented by a labor organization other than the two involved herein, have been permitted to bargain collectively with the Activity through their own, separate units; and (c) notwithstanding that the employees sought have been a part of the Intervenor's unit for a substantial period of time, on no occation has that Union ever actually represented them on either an informal or a formal basis.

Both the Activity and the Intervenor contended that the Petitioner's request be denied. They stressed, (a) that the claimed employees are a small segment of by far the largest collective-bargaining unit at the Activity - about 2,000 employees as opposed to a total of around 400 in the remaining six units - so that the essential issue involved the severance of a group of employees from what, for most purposes, stands as a facility-wide unit with a substantial collective-bargaining history to support it; (b) these employees have not been ignored by the Intervenor in its representational capacity; (c) all seven units were recognized prior to Executive Order 11491, subsequent to which time the Assistant Secretary has made clear, in various decisions, that carve-outs, in light of adequate prior representation, will not be granted except in "unusual circumstances" - not existing in this situation; and (d) the Activity's experience in dealing with seven labor organizations has proven to be an impediment to its effective dealings and efficiency of operations.

The Assistant Secretary concluded that the requested unit was not appropriate. Despite some unusual "aspects" of this case, the evidence weighed in favor of findings that: (1) the Intervenor has been not only the long established collective-bargaining representative for the claimed employees, but also there was no evidence that it had been ineffective and unfair in its dealings with them; (2) nothing with regard to working conditions has changed during this period which might have altered this proven community of interest; and (3) the fragmentation of the Activity's operations for collective-bargaining purposes occurred prior to Executive Order 11491.

A/SLMR No. 215

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. NAVAL REWORK FACILITY,
QUONSET POINT NAVAL AIR STATION,
QUONSET POINT, RHODE ISLAND

Activity

and

Case No. 31-5475 (RO)

OPERATIONS ANALYSIS ASSOCIATION, NO. 011

Petitioner

and

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R1-7

Intervenor

DECISION AND ORDER

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

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

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

2. The Petitioner, Operations Analysis Association, No. 011, seeks a unit composed of all production controllers and electronic technicians in the Operations Analysis Division, Production Engineering Department (approximately 35 employees), excluding all employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, professional employees, and supervisors and guards as defined in the Executive Order. The employees sought would be carved out of an existing unit, one of seven collective-bargaining units at the Activity, which together represent all of the Activity's approximate 2,400 civilian nonmanagerial, nonprofessional and nonsupervisory employees. 1/

The unit affected by the Petitioner's severance request is represented by the Intervenor, National Association of Government Employees, Local R1-7, which, as noted above, is composed of 1,964 of the Activity's approximately 2,400 civilian employees. According to the Activity-Intervenor's latest collective-bargaining agreement, effective from November 14, 1969, to November 13, 1971, 2/ the unit is defined as:"/A/ll eligible employees of the Naval Air Rework Facility, Quonset Point, Rhode Island, except managerial, supervisory, and professional employees and employees in the following positions: Aircraft Quality Control Specialist and Inspector of the Quality Assurance Department; Production Controller of the Production Control Division, Production Planning and Control Department; 3/ Industrial Engineering Technician of the Methods and Standards Division, Production Engineering Department; Aircraft Examiner, Chauffeur, Truck Driver, Truck Driver (Heavy), Truck Driver (Heavy Trailer), Planner and Estimator, Machinist, Machinist (Maintenance), Toolmaker, Toolroom Attendant, Toolroom Mechanic, Machine Operator, Oiler, Helper Machinist and Apprentice (Machinist)."

1/ The following seven labor organizations represent the Activity's employees /unit size is indicated as of June 16, 1972/: (1) National Association of Government Inspectors and Quality Assurance Personnel, Unit No. 7, /date of exclusive recognition/ September 6, 1963, 70 employees; (2) Quonset Point Aeronautical Production Controllers Association, Local 1, October 6, 1965, 102 employees; (3) The Directly Affiliated Local Union No. 3034, Truckers, AFL-CIO, May 5, 1966, 9 employees; (4) National Association of Planners & Estimators & Progressmen, Local No. 18, June 21, 1966, 14 employees; (5) International Association of Machinists and Aerospace Workers, Lodge 616, August 15, 1966, 160 employees; (6) National Association of Government Employees, Local R1-7, December 12, 1966, 1,964 employees; (7) Quonset Point Methods and Standards Analysts Association, September 9, 1969, 23 employees.

2/ No allegation is made that this agreement constitutes a bar to the instant representation petition.

3/ These production controllers, located in a separate department from that of the production controllers involved herein, are represented by the Quonset Point Aeronautical Production Controllers Association, Local 1. Its negotiated agreement with the Activity specifically excludes the instant production controllers, who are left as part of the Intervenor's unit.

Position of the Parties

Petitioner. The Petitioner contends that the unit it seeks to represent is an appropriate one, and the claimed employees should be allowed to select their own, separate collective-bargaining representative. It points to the community of interest shared by these employees, who all work in one division under the general supervision of its division director,and notes that seven other groups of the Activity's employees have been permitted their own exclusive representation units, including production controllers in another department of the Activity. The Petitioner, however, does not advocate a combination of all production controllers in one unit noting that, while their Civil Service Commission job classification series is the same, a number of different positions may fall under the same series. 4/ The Petitioner objects to continuing inclusion of the requested employees in the Intervenor's unit because the Intervenor has failed to represent adequately their interests. Overall, the Petitioner stresses that denial of its petition, in light of the precedent at this particular Activity for granting exclusive representation to other labor organizations, would be an unwarranted form of discrimination by the Assistant Secretary, despite the fact that severance would be required.

Activity. The Activity, as well as the Intervenor, argues that the requested unit is inappropriate. The Activity asserts in this connection that while it has already experienced fragmentation of its employees for collective-bargaining purposes, this experience has proven to be an impediment to its effective dealings and efficiency of operations, and further fragmentizing would only aggravate an already unfortunate situation. Moreover, if these employees are permitted to be severed, there would be no justification for precluding the segmentation of other, similarly situated employees who are also technicians and/or skilled craftsmen.

The Activity also calls attention to the fact that, in every instance, the current seven representation units were recognized prior to Executive Order 11491, which became effective on January 1, 1970, and that since that date, the Assistant Secretary has consistently found, in comparable, although non-severance, situations (see, e.g., U.S. Navy Department, Naval Air Rework Facility, Jacksonville, Florida, A/SLMR No. 59, and Department of the Navy, Naval Air Rework Facility, Naval Air Station, Jacksonville, Florida, A/SLMR No. 75), such fragmented units to be inappropriate.

4/ In this regard, the evidence reveals that the production controllers in the Production Planning and Control Department have different position descriptions from those of the employees in the Production Engineering Department, and they are listed on a separate retention register by the Civil Service Commission. It is contended that such a combination, too, would ignore the commonality shared by the Production Engineering Department's electronic technicians and its production controllers.

Intervenor. The Intervenor contends that the employees sought by the Petitioner are a small segment of a large, essentially activity-wide unit with a substantial collective-bargaining history. These employees have not been ignored by the Intervenor as their exclusive representative, and experience has shown their community of interest with other members of this unit. The Intervenor is in complete agreement with the Activity that further representational fragmentation at this facility would not promote effective dealings and efficiency of operations.

Facts

The Naval Air Rework Facility at Quonset Point, Rhode Island is an industrial operation of the Navy shore establishment. It is located in proximity to the Quonset Point Naval Air Station and is under the command of the Air Station, although it is manned primarily by civilian personnel. Its mission is to manufacture, repair, and modify aircraft and their components; to furnish engineering services; and to perform any other related functions assigned by the Naval command. There are seven other facilities like the Activity in the Naval Air Systems Command.

Organizationally, the Activity is composed of eight departments with only one, the Flight Test Department, fully run by a military staff. The remaining seven are: (1) Administrative Services; (2) Management Controls; (3) Aeronautical Engineering; (4) Quality and Reliability Assurance; (5) Production Planning & Control; (6) Production Engineering; and (7) Production. Departments are divided into about 28 divisions, and most divisions are subdivided into branches (approximately 66 in all). Many branches, especially in the Production Department, are further separated into sections. The Production Department, too, has over 100 specialized shops in its different sections.

All departments fall under the purview of a production officer, with the line of supervision then threading its way down through department, division, branch, and section heads. Employees, with the exception of secretaries and clericals, in a given part of this structure are directly supervised by its head, at whatever level, and that supervisor, in turn, is directly responsible to the head at the next higher level. All secretaries and clericals are supervised by division directors.

The job classifications of production controller and electronic technician, at issue in this case, are found in three departments - Aeronautical Engineering; Production Planning & Control; and Production Engineering. These job classifications have been included in the Intervenor's exclusively recognized unit since its recognition in 1966, 5/

5/ Prior to 1966, both the Intervenor and the Petitioner had informal recognitions at this facility.

with the exception, noted above, of certain production controllers represented by another labor organization. Throughout this 6-year period, the Intervenor and the Activity have executed collective-bargaining agreements, the latest, as previously mentioned covering the period 1969 to 1971.

The specific production controllers and electronic technicians sought by the Petitioner are assigned to the Production Engineering Department which has five divisions: (1) Plant Engineering; (2) Operations Analysis; (3) Methods and Standards; (4) Industrial Planning; and (5) Plant Services. The employees in these classifications are all located in only one of the divisions - Operations Analysis. This division has three branches, and production controllers and electronic technicians work in all three branches. While there are about 210 nonsupervisory employees in the Operations Analysis Division, approximately 35 are in the classifications sought by the Petitioner, with 30 being production controllers and 5 electronic technicians. The number of remaining Activity production controllers and electronic technicians, included, of course, in either the Intervenor's current unit or the third labor organization's unit, is approximately 110, with some of the electronic technicians being located in the Plant Engineering Division of the Production Engineering Department.

In its capacity as the exclusive bargaining representative for the largest number of the Activity's employees, the Intervenor maintains an office, provided by the Activity, at the facility which is open constantly and staffed during working hours. The Intervenor has 10 union officers and about 43 stewards, with its president working full-time on union business in the office. Moreover, from 11:00 a.m. on, the chief steward also works each day in this office. The office has two telephones with publicly listed numbers, and employees are permitted to call this office from their respective work stations about any work-related problems, in addition to being able to talk personally with the union steward or officer assigned to their facility location or to go, in person, to the Intervenor's office.

The work station for the employees sought herein is in a building connected with the building housing the Intervenor's office. Four minutes' walking-time is the estimated distance between the two locations. There are also two telephones in the Operations Analysis Division which its employees may use to call the office and, at present, there is a union steward assigned to the division. 6/ The record reveals that no employee in this division ever specifically requested a steward for the area, expressed a desire to be a steward, or even to be an officer of the Intervenor.

6/ The assignment of a union steward occurred sometime in 1971. Prior thereto, no steward was placed in this particular division; however, five union stewards did function in the department and were readily available to division employees. The Intervenor normally tries to allocate a steward for every 50 employees while also making use of union officers for employee relations purposes.

The Intervenor maintains other lines of communication with its members and the employees it represents. It has access to bulletin boards, and consistently posts notices and information about union matters. It also maintains contact with stewards through the distribution of flyers. Further, the Intervenor's president testified that he makes a point of walking around all parts of the Activity, where the union represents employees, once a week. He speaks not only to employees - sometimes referring a specific problem they mention to him to the nearest steward or union officer for possible settlement at that immediate level first - but also to stewards and officers. The testimony reveals that he has always included the Operations Analysis Division in this procedure and has talked with its employees.

Informal grievances, namely problems handled in unwritten form, are presented to the Activity by the Intervenor's stewards or officers, whereas formal written grievances are handled by its officers. The evidence establishes that the Intervenor has resolved both informal and formal grievances with the Activity which have had a direct effect on all of its unit employees. Since 1966, though, no formal grievance ever was initiated by the Operations Analysis Division employees. However, while no formal grievances have been processed by the Intervenor for production controllers or electronic technicians in this division, the division head testified that, approximately four to six times a year, these employees have come to him personally, and they have, together, settled problems satisfactorily on an individual basis. The division head further stated that no division employee ever complained that the Intervenor had refused to represent him. Further, there was no evidence that division employees have communicated to the Intervenor that they desired its assistance in resolving a problem. 7/

Conclusions

Despite the fact that there are, indeed, several small units in existence at this Activity, in my view,the nature of the Activity's past collective-bargaining history and the record before me clearly demonstrate that it would not effectuate the policies of the Order to find the requested unit appropriate.

Initially, it should be noted that all of the unit fragmentation at this facility took place before Executive Order 11491 became effective. Since that time, my views concerning the severance of a small group of employees from an existing overall unit with a prior bargaining history have been stated in several previous decisions and consistently adhered to.

7/ The parties stipulated that, in May 1971, the Intervenor did assist a secretary in the division with an informal grievance matter even though her job classification was not included in its unit.

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Essentially, this is the issue in this case because notwithstanding six other small units, the Intervenor has to be regarded, in almost all respects, as representing an overall unit because it far outnumbers the other units in its coverage. Thus, "where the evidence shows that an established, effective and fair collective bargaining relationship is in existence, a separate unit carved out of the existing unit will not be found to be appropriate except in unusual circumstances." United States Naval Construction Battalion Center, A/SLMR No. 8.

I do not consider the fact of seven current collective-bargaining representatives at the Activity to constitute an "unusual circumstance" in this situation for the reason stated above concerning the timing of their initial recognition. Moreover, the evidence shows that the Intervenor has been established as the bargaining representative for the requested employees for six years, and that during this period there is no evidence that it has been ineffective and unfair in its dealings with these employees.

Further, there is no evidence to show any kind of changed circumstance which might have destroyed the community of interest between the employees sought and the remainder of the employees in the Intervenor's unit to warrant a carve-out. In all, the Intervenor has not been shown to be remiss in representing the employees in the claimed unit, as the need arises, and on an equal footing with other unit employees. If the Operations Analysis Division production controllers and electronic technicians have not taken full advantage of the opportunity afforded them to participate in and utilize the Intervenor's representational procedures, this is a matter which cannot be held against the Intervenor. What is significant is that the door has always been open for them to do so.

Under these circumstances, I find that the unit sought by the Petitioner is inappropriate for the purpose of exclusive recognition, and shall, therefore, dismiss the petition.

ORDER

IT IS ORDERED that the petition in Case No. 31-5475 (RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
October 30, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

October 31, 1972

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

UNITED STATES ARMY ELECTRONICS COMMAND,
FORT MONMOUTH, NEW JERSEY
A/SLMR No. 216

This case arose as a result of the filing of four representation petitions by National Federation of Federal Employees, Local 476 (NFFE). American Federation of Government Employees, Local 1904, AFL-CIO (AFGE) intervened in each of the petitioned for units. NFFE sought the following units:

1. All professional and nonprofessional employees in Procurement and Production Directorate at Fort Monmouth, New Jersey.

2. All professional and nonprofessional employees of the Electronics Warfare Laboratory, United States Army Electronics Command (ECOM) at Fort Monmouth, New Jersey.

3. All professional and nonprofessional employees of the Directorate of Research, Development and Engineering and ECOM laboratories physically located at Fort Monmouth and vicinity.

4. All professional and nonprofessional employees of the Product Assurance Directorate physically located in Fort Monmouth and vicinity.

In the case involving the petition covering employees in the Product Assurance Directorate, NFFE filed a challenge to the validity of AFGE's showing of interest in support of the latter's intervention, alleging that signatures supporting AFGE's intervention were not authentic. Under the particular circumstances of this case, the Assistant Secretary found that strict adherence to a ten-day challenge period would not be consistent with the proper effectuation of the Order in view of the nature of the challenge involved. Based on the questionable authenticity of the signatures supporting AFGE's showing of interest as revealed by the Regional Administrator's investigation, the Assistant Secretary concluded that revocation of the approval of AFGE's intervention was warranted.

The Assistant Secretary found the units petitioned for by NFFE to be inappropriate. In reaching this determination, the Assistant Secretary noted that many employees of the Activity shared similar skills and performed similar or related job functions. Also, the area of consideration for promotion was Activity-wide, all employees operated under the same

promotion procedure, and there have been several instances of transfer between employees in the units petitioned for and other Activity employees. Additionally, the Assistant Secretary noted that the Activity utilized an integrated work process involving considerable contact and coordination between and among all employees of the Activity's directorates and offices.

Under these circumstances, the Assistant Secretary found that the employees in each of the petitioned for units did not possess a clear and identifiable community of interest separate and apart from other Activity employees. Moreover, he noted that the establishment of the petitioned for units would not promote effective dealings or contribute to the efficiency of agency operations. Accordingly, he ordered that the petitions be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES ARMY ELECTRONICS COMMAND,
FORT MONMOUTH, NEW JERSEY

Activity

and

Case Nos. 32-2003
32-2235
32-2393
32-2432

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES, LOCAL 476

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES,
LOCAL 1904, AFL-CIO

Intervenor

DECISION AND ORDER

Upon petitions duly filed under Section 6 of Executive Order 11491, a consolidated hearing was held before Hearing Officer Charles L. Smith. 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 a brief filed by the National Federation of Federal Employees, Local 476, herein called NFFE, the Assistant Secretary finds:

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

2. In Case No. 32-2003, the NFFE seeks an election in the following unit:

> All nonsupervisory employees, including professional employees, in Procurement and Production Directorate at Fort Monmouth, New Jersey, and also including student trainees, part-time and temporary employees, and excluding supervisors, management officials, guards, employees engaged in Federal personnel work in other than a purely clerical capacity and Army Materiel Command (AMC) interns.

In Case No. 32-2235, the NFFE seeks an election in the following unit:

> All nonsupervisory employees, including professional employees, of the Electronics Warfare Laboratory, United States Army Electronics Command (ECOM), at Fort Monmouth, New Jersey, including student trainees, part-time and temporary employees, and excluding management officials, supervisors, guards, employees engaged in Federal personnel work in other than a purely clerical capacity and AMC interns.

In Case No. 32-2393, the NFFE seeks an election in the following unit:

> All professional and nonprofessional employees of the Directorate of Research, Development, and Engineering and ECOM laboratories physically located in Fort Monmouth and vicinity, including student trainees, part-time and temporary employees, and excluding management officials, supervisors, guards, employees engaged in Federal personnel work in other than a purely clerical capacity, employees at Fort Monmouth in the Atmospheric Sciences Laboratory and Research and Development Technical Support Activity, and AMC interns.

In Case No. 32-2432, the NFFE seeks an election in the following unit:

> All professional and nonprofessional employees of the Product Assurance Directorate physically located in Fort Monmouth and vicinity, including student trainees, part-time and temporary employees, and excluding management officials, supervisors, guards, employees engaged in Federal personnel work in other than a purely clerical capacity, and AMC interns.

The American Federation of Government Employees, Local 1904, AFL-CIO, herein called AFGE, intervened in each of the above-noted cases. 1/

The Activity contends that each of the petitioned for units is inappropriate because all of the elements of the United States Army Electronics Command (ECOM) at Fort Monmouth are involved in a functionally integrated work process, employees in each of the claimed units do not share a clear and identifiable community of interest separate and apart from other employees of the Activity, and the units claimed would not contribute to effective dealings or efficiency of agency operations. It is the Activity's position that the only appropriate unit would include all eligible employees at Fort Monmouth not currently represented or otherwise barred. 2/

The AFGE agrees with the Activity that an installation-wide, residual unit is appropriate and contends that if such a unit were found to be appropriate and an election directed, it would waive the exclusive recognitions it holds currently and incorporate them in the more comprehensive unit.

Procedural Matters

On November 29, 1971, the NFFE filed a challenge to the validity of AFGE's showing of interest filed in connection with the latter's intervention in Case No. 32-2432. The record reveals that this challenge was filed more than ten days after receipt by the Petitioner, NFFE, of a copy of the AFGE's request for intervention.

Notwithstanding the apparent untimeliness of the challenge 3/ and the fact that the AFGE participated fully in the hearing in the matter on the basis of its intervention in each of the subject cases including Case No. 32-2432, the Regional Administrator subsequently investigated the NFFE's challenge and on May 9, 1972 recommended that I revoke approval

---

1/ In view of the disposition herein, I find it unnecessary to pass upon the AFGE's motion to dismiss the NFFE's petition in Case No. 32-2003 based on alleged "lack of cooperation" and the AFGE's motion to dismiss all of the subject petitions based on the allegation that the NFFE failed to serve the AFGE with copies of its petitions pursuant to Section 202.2(e)(3) of the Assistant Secretary's Regulations.

2/ As an alternative position, the NFFE was of the view that the unit proposed by the Activity also would be appropriate.

3/ See Report on a Decision of the Assistant Secretary, Report No. 7, where I found that "With respect to a labor organization intervening under Section 202.5(a) /of the Regulations/, parties should be entitled to a ten day period to challenge the intervenor's showing of interest or status. Such challenges must be filed with the Area Administrator within ten (10) days after the receipt by a party of a copy of the request for intervention."

of the AFGE's intervention in Case No. 32-2432 based on his finding that the "interest submitted appeared to be fraudulent." On May 18, 1972, I requested the AFGE to show cause why approval of its intervention should not be revoked. On May 26, 1972 the AFGE responded to my request contending that it "has never knowingly submitted a fraudulent petition and has no proof that these /signatures on showing of interest forms/ are fraudulent signatures." AFGE further contended that the NFFE's challenge to the intervention was filed untimely.

Under all the circumstances, I find that the challenge to the validity of the AFGE's showing of interest in Case No. 32-2432 should be sustained. Thus, the administrative investigation conducted by the Regional Administrator (of which I take official notice in this matter) revealed that the employee signatures submitted by the AFGE to support its intervention in Case No. 32-2432 were of questionable authenticity. Further, in view of the tainted nature of the AFGE's showing of interest, I find that strict adherence to the ten day challenge period set forth above would not be warranted. Thus, the acceptance of a showing of interest which is of highly questionable validity on the sole basis that the challenge in this regard was filed untimely would not, in my view, be consistent with the proper effectuation of the Order. 4/ Accordingly, in these circumstances, I find that revocation of the approval of the AFGE's intervention in Case No. 32-2432 is warranted.

In view of the gravity of the events which have taken place at Fort Monmouth subsequent to the hearing in the subject cases, I have taken additional official notice of certain conduct by both the AFGE and the NFFE in connection with the consideration of the subject cases. In this regard, I have been advised administratively by the Regional Administrator that post-hearing petitions filed by each of the above-mentioned labor organizations for installation-wide, residual units have been dismissed on the basis of defective showing of interest. Thus, in Case Nos. 32-2572 and 32-2565 the Regional Administrator found that the interest submitted by the petitioning labor organizations, the AFGE and the NFFE, respectively, was of questionable authenticity.

I am both shocked and deeply concerned by the discreditable conduct and apparent disregard of the purposes and policies of the Executive Order displayed by both the AFGE and the NFFE at Fort Monmouth in connection with their respective attempts to establish an adequate showing of interest. The National Office officials of both labor organizations should take immediate steps to ensure that such improper conduct will not be repeated

4/ See, in this regard, Section 205.7(b) of the Assistant Secretary's Regulations which provides that "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 the proper effectuation of the Order." (Emphasis added.)

in future cases. Further, if this situation is repeated, I will not hesitate to make the procedures of the Assistant Secretary unavailable to the parties concerned.

Facts

The Activity is one of eight major subordinate commodity commands of the Army Materiel Command (AMC) and is engaged in the research, design, development, procurement, distribution, supply, and maintenance support of communications-electronics equipment. It is composed of four general groupings: (1) command group, (2) coordinating agencies, (3) functional directorates, and (4) support resource and special staff.

At the functional directorate level there are six directorates: (1) Directorate of Research, Development and Engineering and ECOM laboratories; (2) Directorate of Procurement and Production; (3) Directorate of Materiel Management 5/; (4) Directorate of Product Assurance; (5) Directorate of Maintenance; and (6) Television-Audio Support Agency. 6/ Three of the four units petitioned for in the subject cases include complete, separate directorates, namely (1), (2), and (4) above. The fourth unit petitioned for seeks one of the laboratories within the first of the three units mentioned above.

The Research, Development and Engineering Directorate and ECOM laboratories is composed of staff personnel who are charged with the overall administration of the Activity's seven functional laboratories and the laboratories' support organization. The mission of this Directorate encompasses all areas of research, development and engineering, including basic and applied research, exploratory development, advance development, and engineering design. The record discloses that the majority of the job functions performed by employees in this proposed unit are not unique within the Activity. 7/ Thus, there are other employees throughout the Activity who possess similar skills and perform similar or related job functions as those employees located in the Research, Development and Engineering Directorate and ECOM laboratories at Fort Monmouth. Also, there is evidence of transfer between employees in the laboratories and other directorates and offices of the Activity. In fact, during the 5-year period, 1967-1971, 85 employees transferred from the laboratories to other elements of ECOM, while, at the same time, 42 employees transferred from other elements of ECOM to the laboratories. Moreover, there appears to be significant interchange between laboratory

5/ The Directorate of Materiel Management is located, for the most part, in Philadelphia, Pennsylvania. However, a small segment of the Directorate - the Communications and Electronics Support Branch - is located at Fort Monmouth.

6/ The Television-Audio Support Agency is located in Sacramento, California.

7/ Currently there are approximately 1600 employees in the Research, Development and Engineering Directorate. Of that number, approximately 1000 are employed as engineers and scientists.

employees and employees in the Project Managers' Offices, a staff organization at the command level given authority to oversee the development of a particular commodity. 8/

The Electronics Warfare Laboratory, which contains all of the employees in the unit claimed by the NFFE in Case No. 32-2235, is one of seven laboratories within the Directorate of Research, Development and Engineering. The mission of the Electronics Warfare Laboratory is the research and development of electronics warfare equipment, selected intelligence equipment, and quick reaction fabrication of this equipment.

Of the 162 employees employed by the Electronics Warfare Laboratory, the majority work as either electronics engineers or physicists. The record reveals that other laboratories, as well as several functional directorates of the Activity, employ individuals with similar skills in identical or related job classifications. Moreover, there is evidence of transfer between employees in the Electronics Warfare Laboratory and employees in other laboratories and directorates. In its location at the Evans area, Electronics Warfare Laboratory employees are housed with employees from at least one other laboratory and the record reveals that the sharing of physical facilities, such as the cafeteria and rest rooms, is not uncommon.

There are approximately 882 employees working in the Procurement and Production Directorate in the unit sought by the NFFE in Case No. 32-2003, occupying such job classifications as electrical engineer, engineering technician, contracting officer, and contract specialist. The Procurement and Production Directorate is charged with effecting procurement of equipment, services, and supplies, discharging the Activity production support program, and providing necessary production engineering to include specifications and standardization.

The record reveals that there are other directorates and offices throughout the Activity which employ individuals who possess similar skills and perform similar or related job functions as those possessed and performed by employees working in the Procurement and Production Directorate. Thus, various types of engineers may be found in all other functional directorates as well as other offices. Also, while most procurement-type personnel are located in the Procurement and Production Directorate, the evidence establishes that there are other procurement-type personnel working in other offices of the Activity. The record

8/ The Research, Development and Engineering Directorate is located in the Hexagon area, some 2-1/2 miles from the main post. For the most part, the laboratories also are located in this area. However, several laboratories, including the Electronics Warfare Laboratory, are located in the Evans area, situated approximately ten miles from the main post. At these locations other Activity offices and directorates share building space with employees of the Research, Development and Engineering Directorate.

discloses also that during the first 5 months of fiscal year 1972 there were 14 employees of the Procurement and Production Directorate who moved to other directorates and offices of the Activity as a result of a transfer or promotion. 9/

There are approximately 67 employees working in the Product Assurance Directorate in the unit sought by the NFFE in Case No. 32-2432. The major job classifications in the Product Assurance Directorate include quality control specialists, plans and systems analysts, and engineers of various types. The mission of this Directorate is to plan, develop, and manage their portion of product development as it relates to reliability, maintainability, quality engineering, metrology, calibration, and systems performance assessment.

The evidence establishes that the basic skills utilized by employees in the Product Assurance Directorate are not unique and are not limited solely to the Product Assurance Directorate. For example, engineers also are found in the following Directorates: Procurement and Production, Maintenance, and Research, Development and Engineering. They also are found in the Project Managers' Offices. Further, quality control specialists are located within the Procurement and Production Directorate and in the Project Managers' Offices; and plans and systems analysts also are found in the Research, Development, and Engineering Directorate. 10/ The evidence establishes that there have been instances in which employees of other directorates and offices of the Activity have transferred to the Product Assurance Directorate. Moreover, the evidence establishes that as a result of a recent reduction in force, the Product Assurance Directorate absorbed approximately five employees from the Procurement and Production Directorate.

The evidence reveals that in accomplishing its overall mission the Activity utilizes what is referred to as life-cycle management techniques. Basically, this system provides for the development of a commodity through an integrated work process involving all functional directorates as well as various other Activity offices and directorates. Thus, although each directorate performs its own particular function, it is dependent upon and works in conjunction with the others for the successful completion of a particular stage of development of a specified commodity. This procedure involves a continuous exchange of information and frequent contact among employees of the different directorates. For example, in

9/ The Procurement and Production Directorate is located, for the most part, in the Coles area, 5-6 miles from the main post. Employees of the Procurement and Production Directorate share with employees of other directorates such facilities as the cafeteria, library, etc.

10/ At its location at the main post, Product Assurance Directorate employees share many physical facilities, such as the parking lot, a test laboratory, and a cafeteria, with employees of other directorates and offices of the Activity.

the preparation of a final procurement data package to be distributed ultimately for the solicitation of bids, the Procurement and Production Directorate assumes primary responsibility. However, this information cannot be prepared solely by the Procurement and Production Directorate without the assistance from and coordination with other directorates. Thus, in a situation such as this, the Procurement and Production Directorate must rely on the following directorates to accomplish its mission: The Research, Development and Engineering Directorate provides technical specifications documents and requirements; the Production Assurance Directorate supplies the necessary quality control standards which must be met; and the Maintenance Directorate presents a maintenance program. All of the factors developed by these other directorates must be taken into consideration before the Procurement and Production Directorate can formulate a final procurement package. The record reveals that this type of situation is typical of the interaction which occurs throughout the development of a commodity. Moreover, in this regard, when a problem arises a task force, consisting of employees of all functional directorates, is organized to resolve the particular problem involved. 11/

The record discloses that there is one Civilian Personnel Office which establishes personnel policies for and services the entire Activity. Such matters as hiring, adverse actions, reductions in force, promotions, reassignment of personnel, and maintenance of employee records are handled by this office. The Activity also utilizes a centralized Comptroller Office which is responsible for financial matters, including budgeting, accounting, cost analysis, disbursement and related fiscal policies for the entire command. In addition, all Activity employees operate under the same promotion procedure and the area of consideration for promotion opportunities for all grades of employees at Fort Monmouth is on an Activity-wide basis.

Conclusion

Based on the foregoing, I find that the units claimed by the NFFE in the subject cases are not appropriate for the purpose of exclusive recognition under the Order. As noted above, the record demonstrates the Activity utilizes an integrated work process involving considerable contact and coordination between and among all employees of the Activity's directorates and offices. The record reveals also that many of the employees within the directorates of the Activity including those covered in the subject petitions possess similar skills and perform similar or related job functions. Additionally, there is evidence that the area of consideration for promotion is on an Activity-wide basis and is not confined solely to an individual directorate and, further, all employees of the Activity operate under the same promotion procedure. The evidence

11/ Also, data review boards, composed of employees of all directorates, frequently meet to evaluate the current position of a commodity.

also demonstrates that there have been several instances of transfer between employees in the units petitioned for and employees of other directorates and offices of the Activity. In these circumstances, and noting the Activity's centralized personnel policies and practices, I find that the employees in each of the petitioned for units do not possess a clear and identifiable community of interest separate and apart from other employees of the Activity. Moreover, in my view, such fragmented units would not promote effective dealings or contribute to efficiency of agency operations. 12/ Accordingly, I shall dismiss the petitions herein. 13/

ORDER

IT IS HEREBY ORDERED that the petitions in Case Nos. 32-2003, 32-2235, 32-2393, and 32-2432 be, and they hereby are, dismissed.

Dated, Washington, D. C.
October 31, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

12/ Compare Department of the Army, U. S. Army Electronics Command, Fort Monmouth, New Jersey, A/SLMR No. 83, wherein I found that an appropriate unit included all employees of Research and Development Technical Support Activity at Fort Monmouth. In that case, there was no contention that a more comprehensive unit was appropriate and no evidence was presented as to any interaction between employees of the Research and Development Technical Support Activity and other Activity offices and directorates.

13/ I am administratively advised that both the NFFE and the AFGE lack a sufficient showing of interest in the residual, Activity-wide unit proposed by the Activity and considered appropriate by the NFFE. In view of the disposition herein, I find it unnecessary to make any findings as to the inclusion or exclusion in the proposed units of employees classified as student trainees, part-time, temporary, or AMC interns.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY OF LABOR 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 TREASURY,
DIVISION OF DISBURSEMENT,
BIRMINGHAM, ALABAMA
A/SLMR No. 217

This case involved a petition for clarification of unit filed by the Department of Treasury, Division of Disbursement, Birmingham, Alabama, seeking clarification of the status of two employees. The unit involved is represented currently by the American Federation of Government Employees, Local 2890, AFL-CIO (AFGE). Contrary to the view of the Activity, the AFGE contended that employees classified as Executive Secretary to the Director and the Executive Secretary to the Assistant Director should be included in the certified unit.

The Assistant Secretary found the Executive Secretary to the Director to be a confidential employee. In this respect, he noted that the incumbent in this position, among other things, serves as the personal secretary to the Director who is fully responsible for all labor relations matters at the Activity. Additionally, this employee attends and takes minutes of top-level staff meetings where labor relations matters are discussed, prepares research for the management negotiating team during contract negotiations, types disciplinary action cases and grievances as well as employee appraisals prepared by branch chiefs, and has access to the files where these materials are maintained. In these circumstances, the Assistant Secretary clarified the certified unit to exclude the Executive Secretary to the Director.

With respect to the Executive Secretary to the Assistant Director, the Assistant Secretary concluded that it would not effectuate the purposes and policies of the Order to clarify the certified unit in this regard where, as here, the evidence established that no employee was filling such classification at the present time. Accordingly, he dismissed the petition insofar as it sought to exclude the Executive Secretary to the Assistant Director.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF TREASURY,
DIVISION OF DISBURSEMENT,
BIRMINGHAM, ALABAMA

Activity-Petitioner

and

Case No. 40-3534 (CU 25)

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 2890, 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 George M. Hildreth. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Assistant Secretary finds:

The Petitioner, Department of Treasury, Division of Disbursement, Birmingham, Alabama, herein called the Activity, filed the petition for clarification of unit in the subject case seeking to clarify an existing certified unit by excluding certain employee job classifications. More specifically, the Activity contends that employees classified as Executive Secretary to the Director and Executive Secretary to the Assistant Director are confidential employees and should be excluded from the unit. The certification involved herein was issued by the Area Administrator on March 10, 1971, in Case No. 40-2642(RO), designating American Federation of Government Employees, Local 2890, AFL-CIO, herein called AFGE, as the exclusive representative in the following unit:

> All Wage Board and General Schedule non-supervisory employees at U.S. Treasury, Division of Disbursement, Birmingham, Alabama, excluding all management officials, supervisors, employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, temporary/intermittent employees, and guards.

The AFGE contends that there is no express basis in the Order which would warrant the exclusion of the employees in the two disputed categories. 1/

The evidence establishes that the Director is charged with managing and directing the administrative and technical operations of the Activity, which provides full disbursing services for approximately 133 Federal agencies. Among other duties, the Director has authority with respect to all labor relations matters at the Activity. In this regard, he is responsible for the implementation of Executive Order 11491, as amended, including the negotiation and application of any negotiated agreements. The Assistant Director shares the same responsibilities jointly with the Director and in the latter's absence assumes full responsibility. In this connection, the record reveals that during recent contract negotiations, the Assistant Director served as the chief negotiator for the management negotiating team.

The Executive Secretary to the Director functions as the Director's personal secretary. The evidence establishes that in addition to her normal clerical functions, such as taking dictation, typing, maintaining the Director's and Assistant Director's files, and receiving visitors, the Executive Secretary to the Director attends and takes minutes of top-level staff meetings where labor relations matters are discussed. Further, during the recent contract negotiations, the Executive Secretary prepared research for the management negotiating team to ensure compliance with various guidelines outlined in the Federal Personnel Manual and the Treasury Department Manual, typed Activity counter-proposals, and was present when the Assistant Director discussed negotiation developments with the Director. The record also reveals that the Executive Secretary is involved in the typing of disciplinary action cases and grievances, as well as employee appraisals prepared by branch chiefs and, further, has access to the files where these materials are maintained. 2/

In my view, the foregoing evidence clearly establishes that the Executive Secretary to the Director acts in a confidential capacity with respect to an official who formulates or effectuates general labor relations policies and has access to confidential labor relations materials. As I have found previously that it would effectuate the purposes and policies of the Order if employees, such as the Executive Secretary to the Director, who assist and act in a confidential capacity to persons who formulate and effectuate management policies in the field of labor relations, were excluded from exclusive bargaining units, 3/ I shall clarify the existing certified unit to exclude the Executive Secretary to the Director.

As noted above, by its petition in this matter, the Activity also seeks to exclude the Executive Secretary to the Assistant Director from the certified unit based on the contention that an employee in this job classification is a confidential employee. The record discloses that, at the present time, there is no employee in this classification employed by the Activity and that the Executive Secretary to the Director currently is functioning in a dual capacity. Further, it appears that under the present circumstances the employment of an Executive Secretary to the Assistant Director in the future is speculative. As I have concluded previously in similar circumstances, it would not effectuate the purposes and policies of the Order to clarify a unit where, as here, the job classification sought to be excluded from the certified unit is not, in fact, filled by an employee. 4/ Accordingly, the subject petition, insofar as it seeks to exclude the job classification Executive Secretary to the Assistant Director from the certified unit, is hereby dismissed.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein in which exclusive recognition was granted on March 10, 1971, to American Federation of Government Employees, Local 2890, AFL-CIO, at the Department of Treasury, Division of Disbursement, Birmingham, Alabama,

1/ The AFGE concedes, however, that an incumbent in these positions would be prohibited under Section 1(b) of the Order from participating in the management of a labor organization based on a conflict or apparent conflict of interest.

2/ In this respect, it is noted that she has the combination to the safe where the Director and Assistant Director file all material deemed "confidential".

3/ See The Department of the Treasury, U.S. Savings Bonds Division, A/SLMR No. 185; Portland Area Office, Department of Housing and Urban Development, A/SLMR No. 111; and Virginia National Guard Headquarters, 4th Battalion, 111th Artillery, A/SLMR No. 69.

4/ See Army and Air Force Exchange Service, Golden Gate Exchange Region, Storage and Distribution Branch, Norton Air Force Base, California, A/SLMR No. 190.

be, and it hereby is, clarified by excluding from the said unit the employee job classification Executive Secretary to the Director.

Dated, Washington, D. C.
October 31, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

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

ARMY AND AIR FORCE EXCHANGE SERVICE,
VANDENBERG AIR FORCE BASE EXCHANGE,
VANDENBERG AIR FORCE BASE, CALIFORNIA
A/SLMR No. 218

The subject case involved a representation petition filed by the National Federation of Federal Employees, Local 1001 (NFFE), seeking a unit of all regular full-time and regular part-time Hourly Pay Plan and Commission Pay Plan employees, including off-duty military personnel in either of the foregoing categories, employed by the Vandenberg Air Force Base Exchange, which is a component of the Golden Gate Exchange Region. The Activity was in agreement as to the appropriateness of the claimed unit. A question was raised as to whether employees classified as temporary full-time, temporary part-time, casual and on-call should be included within the unit.

In all the circumstances, the Assistant Secretary found that the petitioned for unit was appropriate. He noted that there was no interchange of employees between any of the components of the Golden Gate Exchange Region, that the Activity was separated geographically from other exchanges, and that the Activity's employees were all subject to the same general working conditions and overall supervision, wage survey system, grievance procedures, leave policies, disciplinary policies, promotion policies, and benefits. He also noted that the one regular part-time employee assigned to Cambria Air Force Station shared a community of interest with the employees in the unit sought and directed that this employee be included in the unit. He noted further that off-duty military personnel who worked the requisite number of hours so as to be included in the categories regular full-time and regular part-time should be included in the unit. In the Assistant Secretary's view, such an Activity-wide unit would promote effective dealings and efficiency of agency operations. Accordingly, he directed that an election be held in that unit. As there were no temporary full-time, temporary part-time, casual or on-call employees presently employed at the Activity, the Assistant Secretary did not make any findings as to the eligibility of employees in such classifications.

A/SLMR No. 218

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ARMY AND AIR FORCE EXCHANGE SERVICE,
VANDENBERG AIR FORCE BASE EXCHANGE,
VANDENBERG AIR FORCE BASE, CALIFORNIA 1/

Activity

and

Case No. 72-RO-3050(25)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 1001

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 J. J. Antonitz. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Assistant Secretary finds:

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

2. The Petitioner, National Federation of Federal Employees, Local 1001, herein called NFFE, seeks an election in a unit of all regular full-time and regular part-time Hourly Pay Plan (H.P.P.) and Commission Pay Plan (C.P.P.) employees, including off-duty military personnel in either of the foregoing categories, employed by the Vandenberg Air Force Base Exchange at Vandenberg Air Force Base, California, and Cambria Air Force Station, excluding temporary full-time and temporary part-time employees, casual and on-call employees, supervisory and managerial employees, employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees and guards. 2/ The Activity essentially agrees that the unit sought, as amended, is appropriate. 3/ A question was raised as to whether employees classified as temporary full-time, temporary part-time, casual and on-call should be included in the claimed unit.

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

The Unit

The Activity, Vandenberg Air Force Base Exchange, is an administrative subdivision, along with 23 other base exchanges, of the Golden Gate Exchange Region. It employs approximately 247 employees at the Vandenberg location. Although a part of the Golden Gate Exchange Region, the Activity has no administrative or logistical connection with any of the other exchanges within the Region. Organizationally attached to the Activity is the Cambria Air Force Station Exchange located about 90 miles north of Vandenberg, which employs one regular part-time civilian employee.

The mission of the Activity is to provide quality merchandise and services at reasonable prices to members of the military and authorized patrons on the premises of Vandenberg Air Force Base. A General Manager is in overall charge of the following five primary functions performed by the Exchange: retail operations, food operations, accounting, personnel, and service operations. Reporting to the General Manager is an Operating Manager for each subdivision. In addition, the General Manager is responsible directly for the Maintenance Section which has as its function the repair and maintenance of the Exchange facilities. 4/ Under the various subdivisions are approximately 15 branches dealing in retail merchandising, food dispensing, and service related operations such as dispensing gasoline and making mechanical repairs on automobiles. In order to carry out its mission, the Activity operates a main Retail Store and annexes, a Main Cafeteria, Snack Bars, a "Run In Chef Drive-In," an Ice Cream Shop, Barber Shops, a Beauty Shop, and Service Stations. Each of these facilities is headed by a manager who reports directly to the General Manager. Among the employees included in the claimed unit are retail sales clerks, door-checkers, customer service clerks, retail displayers, stock handlers, porters, retail and food cashier-checkers, cooks, food service helpers, motor vehicle operators, counter and snack stand attendants, barbers, beauticians, and service station attendants.

2/ The unit description was amended at the hearing.

3/ At the close of the hearing, the NFFE requested that a consent election agreement meeting be directed. In view of the disposition of this case, I find it unnecessary to rule on the NFFE's motion. See also the discussion below on employee eligibility.

4/ The Maintenance Section consists of two employees. Any maintenance work which cannot be performed by these individuals is subcontracted to outside contractors by the General Manager.

With respect to the duties of the employees in the unit sought, the evidence reveals that retail operation employees perform sales and other related functions; food service operation employees are engaged in the preparation and sale of foods and beverages; and service operation employees dispense gasoline and oil and perform minor vehicle repairs and tune-ups. The record reveals that these employees are all subject to the same general working conditions and overall supervision, wage survey system, grievance procedures, leave policies, disciplinary policies, and promotion policies. Availability of fringe benefits is governed uniformly by an employee's classification category (e.g., regular full-time, regular part-time, temporary part-time, or on-call). The single civilian employee located at Cambria Air Force Station Exchange sought to be included in the claimed unit is employed on a regular part-time basis. 5/ In this regard, the record reveals that the Cambria employee was hired at Vandenberg, all of her personnel papers are kept at Vandenberg, and if discipline were required it would be handled through procedures existing at Vandenberg.

Under all the circumstances, and noting the Activity-wide nature of the unit sought, the geographical separation between the Vandenberg Air Force Base Exchange and other exchanges in the Golden Gate Exchange Region and the lack of interchange of employees among the various components of the Golden Gate Region, I find that the claimed employees share a clear and identifiable community of interest and, therefore, constitute an appropriate unit for the purpose of exclusive recognition. 6/ Moreover, in my view, such a comprehensive unit will promote effective dealings and efficiency of agency operations. 7/

5/ The record shows that the other Cambria Air Force Station Exchange employees are full-time military personnel performing military duty.

6/ As to the one civilian employee located at Cambria, the record shows that this regular part-time employee shares the same overall supervision, wage survey system, grievance procedure, leave policies and disciplinary policies as other employees in the unit found appropriate, and that if not included in such unit would constitute, in effect, an inappropriate single employee unit. Cf. DCA Field Office, Fort Monmouth, New Jersey, FLRC No. 72A-5. Under these circumstances, I find the regular part-time employee located at Cambria Air Force Station Exchange should be included in the unit found appropriate.

7/ Cf. Army and Air Force Exchange Service, MacDill Air Force Base Consolidated Exchange, A/SLMR No. 29.

Employee Eligibility

The record reveals that the Activity employs approximately 24 off-duty military personnel who because of agency regulations are classified as "temporary part-time." 8/ These employees perform substantially the same work, are paid according to the same wage scale and are subject to the same working conditions as civilian employees of the Activity. Under these circumstances, I find that if such off-duty military personnel have been employed for a sufficient number of hours to acquire regular full-time or regular part-time employee status, they should be considered as such for the purpose of inclusion in the appropriate unit. 9/

Based on the foregoing, 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 regular full-time and regular part-time Hourly Pay Plan (H.P.P.) and Commission Pay Plan (C.P.P.) employees, including off-duty military personnel in either of the foregoing categories, employed at the Vandenberg Air Force Base Exchange, Vandenberg Air Force Base, and the Cambria Air Force Station Exchange, Cambria Air Force Station, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, management officials, and supervisors and guards as defined in the Order. 10/

8/ Agency Regulation, AR 60-21/AFR 147-15, dated August 27, 1970, provides that temporary part-time employees who work more than 90 days are converted to regular part time, "except military personnel employed on off-duty hours."

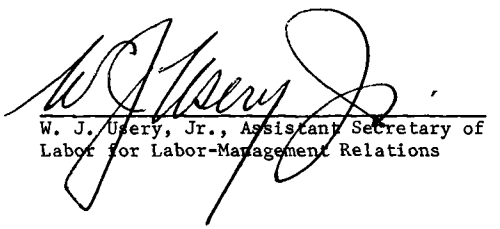
9/ I have stated previously that off-duty military personnel, who work a sufficient number of hours to be classified as either regular full-time or regular part-time, may not be excluded from the unit on the basis of agency regulations which categorize such personnel as "temporary part-time" employees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

10/ Inasmuch as the record establishes that there are no temporary full-time, temporary part-time, casual or on-call employees presently employed at the Activity, I shall not at this time make any findings of fact with respect to whether they properly would come within the excluded category of employees based on their respective job status at the Activity. Cf. Alaskan Exchange System, Base Exchange, Fort Greely, Alaska, A/SLMR No. 33; Army and Air Force Exchange Service, Golden Gate Exchange Region, Storage and Distribution Branch, Norton Air Force Base, California, A/SLMR No. 190.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but no later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the National Federation of Federal Employees, Local 1001.

Dated, Washington, D. C.
November 22, 1972



W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

November 22, 1972

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

ARMY AND AIR FORCE EXCHANGE SERVICE,
RICHARDS-GEBAUR CONSOLIDATED
EXCHANGE, RICHARDS-GEBAUR AIR
FORCE BASE, MISSOURI
/WHITEMAN AIR FORCE BASE EXCHANGE,
KNOB NOSTER, MISSOURI/
A/SLMR No. 219

In the subject case, the Petitioner, American Federation of Government Employees, AFL-CIO, Local 2361 (AFGE) sought an election in a unit consisting of employees in the Army and Air Force Exchange Service (AAFES) employed at the Whiteman Air Force Base Exchange in Knob Noster, Missouri. The Activity contended, among other things, that such unit was inappropriate inasmuch as employees of the Whiteman Air Force Base Exchange did not have a community of interest distinguishable from that of two other installations, the Richards-Gebaur Consolidated Exchange and the Marine Records Center Exchange located respectively in Belton, and Kansas City, Missouri.

The Assistant Secretary found that the unit sought by the AFGE was appropriate for the purpose of exclusive recognition. In this regard, he noted that the Resident Exchange Manager at the Whiteman Air Force Base effectively made the day-to-day management decisions at that location. Thus, the Resident Exchange Manager's recommendations for employment, termination, promotion and leave have invariably been approved by the General Manager at the Richards-Gebaur Exchange. Further, the record reveals that there has been only one employee transfer from Whiteman to the Richards-Gebaur Exchange in the last five years, and no interchange between the Exchanges in this period. The Assistant Secretary also found it to be of particular significance that the Whiteman Exchange is located approximately 70 miles from the Richards-Gebaur Exchange, and about 80 miles from the Marine Records Center Exchange.

Regarding certain alleged supervisors, the Assistant Secretary found that the Storeroom "Supervisor," the Food Activities "Supervisor" and the "Supervisory" Sales Clerk generally worked alongside other employees, and that their alleged supervisory responsibilities were exercised only in the absence of their respective managers and on an intermittent and infrequent basis. Accordingly, the Assistant Secretary found they were not supervisors within the meaning of the Order. He found further that there was insufficient evidence on which to determine the unit placement of the Whiteman Main Store Department Manager and the Service Clerks who were alleged to be supervisory employees, or the Exchange Manager's Secretary, who it was asserted was a "confidential" employee.

A/SLMR No. 219

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ARMY AND AIR FORCE EXCHANGE SERVICE,
RICHARDS-GEBAUR CONSOLIDATED EXCHANGE,
RICHARDS-GEBAUR AIR FORCE BASE, MISSOURI 1/
/WHITEMAN AIR FORCE BASE EXCHANGE, KNOB NOSTER, MISSOURI/

Activity

and

Case No. 60-3007(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2361

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 Leon H. Skidgel. 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 Petitioner's brief, the Assistant Secretary finds:

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

2. The Petitioner, American Federation of Government Employees, AFL-CIO, Local 2361, hereinafter called AFGE, seeks an election in a unit of all regular **full-time and regular part-time employees employed by Richards-Gebaur Consolidated Exchange who are working at Whiteman Air Force Base, Knob Noster, Missouri,** excluding employees engaged in Federal personnel work, professional employees, management officials, supervisors and guards.

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

The Activity contends that a unit limited to employees of the Whiteman Air Force Base Exchange is inappropriate and that an appropriate unit should include, in addition to employees of the Whiteman Air Force Base Exchange, employees of the Richards-Gebaur Consolidated Exchange at Richards-Gebaur Air Force Base located at Belton, Missouri, and those of the Marine Records Center, Kansas City, Missouri. The Activity argues in this regard that all of these locations are in close proximity; that the overall administration and supervision of these exchanges and their employees is vested in one central administrative office; and that there is constant employee contact, identity of wage schedules, similarity of skills, and an identical labor relations policy for all employees.

Unit Issue

The Richards-Gebaur Consolidated Exchange is one of many installations operated all over the world by the Army and Air Force Exchange Service, herein called the AAFES, whose function is to provide military personnel and other authorized patrons with certain merchandise and services. Richards-Gebaur Consolidated Exchange is under the overall supervision of a General Manager who is responsible for the operation of the base exchanges at Whiteman Air Force Base, Richards-Gebaur Air Force Base, and the Marine Records Center. 2/

The petitioned for unit consists of some 42 employees 3/ stationed at Whiteman Air Force Base, herein called Whiteman, which is located approximately 70 miles from Richards-Gebaur Air Force Base and approximately 80 miles from the Marine Records Center. The Whiteman Exchange operates a Main Store, a Minuteman Market, a Cafeteria, a Stockroom, a Service Station, and a "Toyland." 4/ The operation of these facilities is conducted under the overall supervision of a Resident Exchange Manager located at Whiteman who is responsible to the General Manager of the Richards-Gebaur Consolidated Exchange at Richards-Gebaur Air Force Base. 5/

2/ In addition to the General Manager, the Richards-Gebaur Exchange hierarchy includes an Operations Manager, a Personnel Manager, an Accounting Manager, a Main Store Manager, a Stockroom Manager, an Annex Manager, a Service Operation Manager, and a Service Station Manager.

3/ This figure includes three regular part-time employees at Whiteman who are hired for an expected period of more than 90 days with a regularly scheduled workweek of at least 16 but not more than 35 hours.

4/ The "Toyland" is a seasonal operation operating only from September until immediately after Christmas.

5/ In addition to the Resident Exchange Manager, the Whiteman Exchange hierarchy includes a Main Store Manager, a Branch Manager, a Service Station Manager, and a Food Activities Manager.

The exchange facilities at Richards-Gebaur Air Force Base employ a total of some 95 employees, including 4 employees classified as regular part-time. The Richards-Gebaur Exchange operates a Main Store, a "Stop and Shop" Store, a Snack Bar, a Service Station, a Stockroom, a facility at Camp Clark, 6/ and various concessions.

The exchange facility at the Marine Records Center which, as noted above, is located some 80 miles from Whiteman, consists of a small retail outlet. This outlet carries necessity items for the 100 marines who are assigned to that location. There are only two exchange employees regularly assigned to the Center. The record reveals that while the AAFES operations within the Center are under the general supervision of the General Manager, the employees are, in fact, supervised immediately by an Annex Manager who is located there. Further, the employees at the Center have essentially the same classifications as those at Whiteman.

The Resident Exchange Manager at Whiteman is responsible primarily for the operation of the Whiteman Exchange although, on occasion, management officials from the Richards-Gebaur Exchange are sent to Whiteman to assist the latter's various managers, to conduct personnel training and inspections and to consult with the Resident Exchange Manager. With respect to employees at the Whiteman Exchange, the Resident Exchange Manager has authority to review their performance evaluations and any disciplinary actions taken by the various levels of supervision at that facility. In this connection, employees may discuss grievances on an informal basis with their immediate supervisors. Thereafter, the Resident Exchange Manager has the authority to adjust such grievances. 7/ The record reveals that the recommendations of the Resident Exchange Manager at Whiteman with respect to such matters as hiring, promotions, discharges, and leave are invariably approved by the General Manager at Richards-Gebaur. Furthermore, the record reflects that there has been no interchange of Whiteman employees with the other exchanges of the Richards-Gebaur Consolidated Exchange in the past five years and that only one transfer has taken place.

Based on the foregoing circumstances, I find that the employees in the petitioned for unit share a clear and identifiable community of interest which is distinguishable from the Exchange employees at the Marine Records Center and Richards-Gebaur Air Force Base. Thus, the record reveals that, for all practical purposes, it is the Resident Manager at the Whiteman Exchange who effectively makes the day-to-day management decisions at that location. And

6/ Camp Clark is a seasonal operation serving the National Guard while in training and is operated from June Through August. It employs only employees classified as temporary full-time who are terminated at the end of each summer.

7/ When grievances reach a formal stage they must be directed to the General Manager at Richards-Gebaur.

while the same personnel policies, wage rates, fringe benefits, and other working conditions are applied generally to all employees of the Richards-Gebaur Consolidated Exchange, it is left for the Whiteman Exchange Resident Manager to effectuate such policies for the employees at that particular facility. Furthermore, I find that it is of particular significance that the Whiteman Exchange is located approximately 70 miles from the Richards-Gebaur Exchange and 80 miles from the Marine Records Center. Accordingly, and noting that no labor organization is seeking to represent the claimed employees on a more comprehensive basis, I find that the employees covered by the AFGE's petition constitute an appropriate unit for the purpose of exclusive recognition. 8/

Eligibility Issues

Questions were raised as to whether the Storeroom "Supervisor,"the Food Activities "Supervisor" and the "Supervisory" Sales Clerk at the Whiteman Exchange are supervisory employees within the meaning of the Order and, therefore, should be excluded from any unit found appropriate. In this connection, it was contended that these employees adjust employee grievances, assign work, adjust customer complaints, interview prospective employees, issue verbal reprimands and are paid at a higher rate than those employees who purportedly report to them. The record, however, indicates that the incumbents in the above named positions generally work alongside the other employees and that the latter employees are fully trained and are able to perform all of the necessary job functions without immediate guidance or direction. Moreover, the record discloses that any alleged supervisory authority exercised by the claimed supervisors occurs only during the absence of their respective managers which is infrequent. Under these circumstances, I find that the Storeroom "Supervisor," the Food Activities "Supervisor" and the "Supervisory" Sales Clerk at the Whiteman Exchange are not supervisors within the meaning of the Order as it is clear that any supervisory authority which they may exercise occurs only on an intermittent and infrequent basis. Therefore, I will include employees in the above-noted classifications in the unit found appropriate. 9/

8/ Cf. Army and Air Force Exchange Service, Altus Air Force Base Exchange, A/SLMR No. 179 and Army and Air Force Exchange Service, MacDill Air Force Base Consolidated Exchange, A/SLMR No. 29.

9/ The evidence is insufficient to establish whether or not the Main Store Department Manager and the Service Clerks at the Whiteman Exchange are supervisors within the meaning of the Order, or whether the Manager's Secretary at the Whiteman Exchange meets the criteria for a "confidential" employee set forth in Virginia National Guard Headquarters, 4th Battalion 111th Artillery, A/SLMR No. 69. Accordingly, I shall make no eligibility findings with respect to these employees.

Based on the foregoing, 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 regular full-time and regular part-time employees, including off-duty military personnel in either of the foregoing categories, 10/ employed by the Richards-Gebaur Consolidated Exchange and working at the Whiteman Air Force Base Exchange, Whiteman Air Force Base, Knob Noster, Missouri; excluding employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, management officials, and supervisors and guards as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below 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 those 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 2361.

Dated, Washington, D.C.
November 22, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

10/ The record reveals that there are off-duty military personnel working as regular part-time employees at the Whiteman Air Force Base Exchange. As I stated in Army and Air Force Exchange Service, Fort Huachuca Exchange Service, Fort Huachuca, Arizona, A/SLMR No. 167, off-duty military personnel who otherwise qualify for inclusion in the unit found appropriate and who work a sufficient number of hours to be classified as either regular full-time or regular part-time may not be excluded from the unit on the basis of agency regulations which automatically categorize such personnel as "temporary part-time" or otherwise automatically exclude them from bargaining units. I am administratively advised that the AFGE has submitted to the Area Administrator in excess of a 30 percent showing of interest in the unit found appropriate.

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

GENERAL SERVICES ADMINISTRATION,
REGION 2, NEW YORK, NEW YORK
A/SLMR No. 220

This case involving a representation petition filed by the International Federation of Federal Police (IFFP) seeking a unit of U. S. Guards, U. S. Special Police, and Federal Protective Officers employed by Region 2 of the General Services Administration, raised questions as to (1) whether an existing agreement between the Activity and the American Postal Workers' Union, Local 123, (APWU) covering a unit of guard and nonguard employees constituted a bar, and (2) the eligibility of the Activity's firefighters who performed certain guard-type functions for inclusion in the claimed unit of guards.

The record revealed the existence of a current negotiated agreement between the Activity and the APWU covering a unit of all nonsupervisory Public Buildings Service Employees in Albany, New York, including guards, and that exclusive recognition for the unit was granted under Executive Order 10988. While recognizing the fact that Section 10(b)(3) of Executive Order 11491 prohibits the inclusion of any guards with nonguard employees, the Assistant Secretary found that the negotiated agreement between the APWU and the Activity constituted a bar to the IFFP's petition insofar as it covers the guards employed by the Activity in Albany, New York. The Assistant Secretary noted the "legislative history" of Executive Order 11491, and concluded that where, as here, a unit containing guards and nonguards is covered by a negotiated agreement, a petition filed during the term of such agreement will be barred unless it is filed in accordance with the requirements of Section 202.3(c) of the Assistant Secretary's Regulations.

With respect to the Activity's firefighters performing guard-type functions, the Assistant Secretary found they are not guards within the meaning of the Order and should not be included in the appropriate unit. The Assistant Secretary noted particularly that the Activity's firefighters' primary job function is to respond to fires and threats of fires at the depots and that any guard functions they perform are incidental to their fire fighting functions. Accordingly, he directed that an election be conducted in the unit petitioned for by the IFFP.

A/SLMR No. 220

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,
REGION 2
NEW YORK, NEW YORK

Activity

and Case No. 30-4659(RO)

INTERNATIONAL FEDERATION OF FEDERAL POLICE

Petitioner

and

LOCAL 907, NATIONAL FEDERATION OF
FEDERAL EMPLOYEES

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, a hearing was held before Hearing Officer Saul Lubitz. 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, International Federation of Federal Police, herein called IFFP, seeks an election in a unit of all U. S. Guards, U. S. Special Police and Federal Protective Officers (FPO's) assigned to General Services Administration, Region 2, excluding supervisors, management officials, professional employees and employees engaged in Federal personnel work in other than a purely clerical capacity. 1/

The Activity, the IFFP and the Intervenor, Local 907, National Federation of Federal Employees, take the position that the petitioned for unit is appropriate. However, questions were raised concerning the eligibility for inclusion in the claimed unit of the Activity's firefighters who performed certain guard-type functions.

The General Services Administration is responsible for the management of Federal buildings. It is headquartered in Washington, D.C., and has ten regional offices. Region 2, which is headquartered in New York, encompasses the states of New York, New Jersey, the Commonwealth of Puerto Rico, and the Virgin Islands. All of the employees in the claimed unit are employed by the Public Buildings Service, a subdivision of the Activity.

The Activity has 128 guards and 102 FPO's working at eight locations within the New York City metropolitan area and at ten locations elsewhere within the Region. Although the hiring requirements are more stringent for FPO's than for guards, both perform essentially the same duties and are under the same supervisory structure. Guards and FPO's perform security functions - guarding building entrances, checking the identity of visitors, inspecting packages, patrolling facilities and directing traffic. Both wear uniforms and numbered badges while on duty and work eight-hour shifts.

The record reveals that there are several collective-bargaining agreements in effect in the Region, including an agreement covering guards in Albany, New York. The Activity contends that the agreement covering the Activity's guards in Albany constitutes a bar as to those employees.

In this latter regard, the evidence establishes that under Executive Order 10988, the American Postal Workers' Union, Local 123, (APWU) was granted exclusive recognition for a unit of all nonsupervisory Public Buildings Service employees in Albany, New York,

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

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including guards. The evidence also establishes that at the time the petition in the subject case was filed, the employees in the exclusively recognized unit were covered by a collective-bargaining agreement. Although recognizing the fact that Section 10(b)(3) of the Order states that a unit shall not be established if it includes any guard together with other employees, I find that in the particular circumstances of this case, the negotiated agreement between the APWU and the Activity constitutes a bar to the IFFP's petition insofar as it covers the guards employed by the Activity in Albany, New York. 2/ Thus, the "legislative history" of Executive Order 11491, contained in the Study Committee's Report and Recommendations on Labor-Management Relations in the Federal Service, indicated clearly that the requirements that guards be represented in separate units by organizations which do not admit to membership and are not affiliated directly or indirectly with organizations which admit to membership, employees other than guards, would not affect existing units or representation but would be applied in all unit and representation determinations under the new Order. Based on the "legislative history," it is my view that where, as here, a unit containing guards and nonguards is covered by a negotiated agreement, a petition filed during the term of such agreement will be barred unless it is filed in accordance with the requirements set forth in Section 202.3(c) of the Assistant Secretary's Regulations.

The record reveals that the Activity employs 65 firefighters at storage depots in four remote locations - Scotia and Binghamton, New York, and Belle Meade and Raritan, New Jersey. The evidence establishes that their primary responsibility is to respond to fires and threats of fires at the depots. Inasmuch as the Activity employs no guards or FPO's at the depots, the firefighters also perform security duties. In this connection, the record discloses that firefighters make regular patrols of the depots, which patrols accomplish the dual function of watching for fires as well as for intruders. Additionally, while firefighters are on duty at the main gate they simultaneously monitor the fire control boards which, at the locations involved herein, are found in the guardhouse at the main gate. In this regard, they are authorized to close the gate if they are needed to fight a fire. The evidence establishes that the firefighters spend the preponderance of their time performing fire fighting-related duties and, unlike the guards and FPO's, do not have arrest powers.

2/ The record reveals that five guards are employed by the Activity in Albany, New York.

Also, the record reveals that firefighter uniforms differ from those worn by guards and FPO's, that firefighters are subject to a different supervisory structure than guards and, that unlike the guards and FPO's, firefighters work 24-hour shifts.

Based on the foregoing circumstances and noting particularly that the firefighters' primary job function is to respond to fires and threats of fires at the depots and that any guard functions they perform are incidental to their fire fighting functions, I find that the Activity's firefighters are not guards within the meaning of the Order.

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

> All guards, including Federal Protective Officers, employed by the General Services Administration, Region 2, excluding guards employed by the General Services Administration, Region 2, in Albany, New York, employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, management officials, and supervisors as defined in the Order. 3/

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

3/ Although the claimed unit included the classification U.S. Special Police, no evidence was adduced with respect to the duties of this job category. Accordingly, I shall make no finding with respect to their eligibility for inclusion in the proposed unit.

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 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 International Federation of Federal Police. 4/

Dated, Washington, D.C.
November 30, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

4/ A representative of Local 2041, American Federation of Government Employees, AFL-CIO (AFGE) entered an appearance at the hearing and was permitted to participate. The evidence reveals, however, that the AFGE did not effect a timely intervention in this matter. In any event, I find that, even if the AFGE's intervention was timely, neither the AFGE, nor the NFFE (which intervened timely), is eligible for placement on the ballot because they are labor organizations which admit to membership employees other than guards. In this regard, see Section 10(c) of the Order.

November 30, 1972

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

926TH TACTICAL AIRLIFT GROUP,
U.S. AIR FORCE RESERVE,
NAVAL AIR STATION,
BELLE CHASSE, LOUISIANA
A/SLMR No. 221

The Petitioner, National Federation of Federal Employees, Local 513, Independent, (NFFE), sought an election in a unit of all nonprofessional employees of the 926th Tactical Airlift Group, United States Air Force Reserve, located at the Naval Air Station, Belle Chasse, Louisiana.

The Assistant Secretary found that the unit sought was appropriate for the purpose of exclusive recognition. In reaching this determination, he noted that the Activity is the only Air Force tenant located on the Naval Air Station at Belle Chasse, operates independently of other tenants on the host Naval base, is geographically separated from other Air Force Reserve units, and is engaged in an operation requiring functional integration of its component parts. Moreover, he found the employees of the Activity work in close physical proximity to each other, enjoy similar working conditions, are subject to the same overall supervision, are all served by the same civilian personnel office, and are in the same area of consideration for purposes of reduction in force.

In these circumstances, the Assistant Secretary concluded that the employees sought by the NFFE possessed a clear and identifiable community of interest and that such a unit would promote effective dealings and efficiency of agency operations.

With regard to 14 disputed job classifications, the Assistant Secretary found: (1) the Aircraft Loadmaster (Instructor), GS-9, who supervised only active-duty reservists, to be a supervisor; (2) the Public Information Officer to be a management official; (3) the Aircraft Maintenance Analysis Technician, GS-9, to be neither a management official nor a supervisor; and (4) the Aircraft Loadmaster (Instructor), GS-8, the Warehouseman Leader, WL-6, and the "Shop Chiefs" (8 in number) not to be supervisors within the meaning of the Order. With respect to the position of Flight Engineer (Instructor), GS-9, the Assistant Secretary, while determining that the employees in this position do not perform the functions of management officials, found there was insufficient information to determine whether they were supervisors.

The Assistant Secretary directed an election in the unit found appropriate.

A/SLMR No. 221

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

926th TACTICAL AIRLIFT GROUP,
U.S. AIR FORCE RESERVE,
NAVAL AIR STATION,
BELLE CHASSE, LOUISIANA

Activity

and

Case No. 64-1803(25)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 513, 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 Louis P. 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, 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 513, Independent, herein called NFFE, seeks an election in a unit of all employees, including all "temporary" employees whose appointments exceed 90 days, of the 926th Tactical Airlift Group, United States Air Force Reserve, located at the Naval Air Station, Belle Chasse, Louisiana, excluding all employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, management officials, confidential employees, casual employees, and supervisors and guards as defined in the Executive Order.

While the parties herein agreed on the appropriateness of the petitioned for unit, they disagreed as to the unit eligibility status of some 14 employee job classifications. In this regard, the NFFE maintained that the questioned classifications were eligible for unit inclusion, while the Activity contended that the employees involved performed functions of a supervisory or managerial nature and, as such, should be excluded from the proposed unit.

Unit Determination

The 926th Tactical Airlift Group, located at Belle Chasse, Louisiana, is part of a chain of command which runs through the 446th Tactical Airlift Wing, Ellington Air Force Base, Texas; to the Central Air Force Reserve Region, also at Ellington Air Force Base; and, finally to the Air Force Reserve Headquarters, Robins Air Force Base, Georgia. As a component of the United States Air Force Reserve, the Activity's particular mission is to effectuate tactical airlifts, which function includes: (1) delivery of tactical and airborne units, personnel, supplies, and equipment; (2) preparation of unprepared landing areas by air drops or air landings; and (3) provision of tactical forces until they are withdrawn or otherwise supplied. Additionally, the Activity has a substantial reserve training commitment which results in the regular influx, at scheduled times, of active-duty reservists for training purposes and for the fulfillment of reserve obligations.

The Activity is the sole Air Force tenant 1/ at the host Naval Air Station located at Belle Chasse, Louisiana. It operates as a functionally independent entity and is the only Air Force installation within a radius of 50 miles. Overall responsibility for the Activity's operations lies with a commander, under whose direction are approximately 210 employees. The civilian complement is comprised primarily of Air Reserve Technicians (ART's), with about 90 civilian non-reservists occupying the remaining positions. 2/ The employees of the Activity are physically located in three buildings which are in close proximity to each other, and they function primarily in four major organizational groupings: Administration; Aircraft Maintenance; Operations and Training; and Supply. While each grouping is composed of employees with specialized skills, training and experience, the record reveals that the successful completion of the Activity's overall mission requires mutual dependence among these specialized parts for, among other things, accurate information and reliable production performance.

Within each organizational grouping, employees work a regular 40-hour week performing related job functions in work locations (shops) or offices allocated for their use. Each grouping possesses

1/ The remaining tenants on the host Naval base are units of the Air National Guard, U.S. Coast Guard, Marine Reserve, and Naval Air Reserve.

2/ The Activity's ART's work a regular 40-hour week and differ from the other civilian employees in only one major respect; namely, to retain their civilian jobs, ART's must maintain reserve status wherein they hold military grades and assume various responsibilities with regard to reservists on active duty.

a separate line of supervision with the degree of supervision varying in accordance with employee positions, grades and experience. The evidence establishes that exchange of personnel between the Activity and other Air Force Reserve units at other locations is minimal and that contact with other Air Force Reserve units is infrequent.

Although, as noted above, the Activity is located at the Naval Air Station at Belle Chasse, the record reveals that its payroll office is situated at Robins Air Force Base in Georgia and its personnel office is one of several branches of the Central Civilian Personnel Office (CCPO), located at Ellington Air Force Base, Texas. Except for records of proposed personnel actions, all official personnel records relating to the Activity's employees are maintained at the CCPO at Ellington Air Force Base, and most personnel actions taken by the Activity are sent to that office for processing. While the Activity relies on the CCPO for overall personnel support, it maintains also its own active personnel office, wherein specific policies applying to the 926th Tactical Airlift Group are formulated. Both the Activity's ART's (in their civilian capacity) and its regular civilian employees are serviced by the Activity's personnel office. While the regular civilian employees are covered by the usual Civil Service procedures regulating hiring, job classifications, pay, promotion, discipline, sick and annual leave, and retirement, the ART's are subject to two classification policies. Thus, the grades allocated to ART positions are determined by the Air Force Reserve Headquarters, which provides identical standardized position descriptions for all reserve units utilizing such positions, and which remain the same regardless of location. Further, because the ART's are also regular civilian employees, they must meet the additional basic position requirements as assigned by the Civil Service Commission. To avoid possible conflict between the dual responsibilities of the ART's, the record reveals that in performing its personnel functions, the Activity's personnel office exerts every effort to make a distinction between their military and civilian duties.

For purposes of reductions in force, the Activity is regarded as a separate area of consideration. With respect to promotions and job vacancies, priority is given to individuals within the Activity's own organization, but where no qualified candidate is available at this level, the Activity looks to other Air Force Reserve organizations on a nationwide basis and to the applicable Civil Service registers. As a result of this promotion policy, the record reveals that the frequency of transfers with co-equal Air Force Reserve units is limited and those transfers which do occur are of a permanent nature. 3/

Based on the foregoing, I find the unit sought is appropriate for the purpose of exclusive recognition under the Order. In this connection, it is noted that the evidence establishes that the Activity

3/ The record indicates that since November 1971, there have been no transfers into the 926th Tactical Airlift Group.

operates independently of the host organization and of other tenants at the Naval Air Station at Belle Chasse; is geographically separated from other Air Force Reserve units; and is engaged in an operation requiring functional integration of its component parts. Moreover, all the employees of the Activity work in close proximity to each other, enjoy similar working conditions, are subject to the same overall supervision, are in the same area of consideration for purposes of reductions in force, are all served by the same civilian personnel office, and have limited contact with other Air Force Reserve units. The evidence also shows that employee transfers between the Activity and other Air Force reserve units are minimal and of a permanent, as opposed to a temporary, nature. Under these circumstances, I find that the employees in the petitioned for unit share a clear and identifiable community of interest and that such a unit will promote effective dealings and efficiency of agency operations. Accordingly, I shall direct an election in the petitioned for unit.

Employee Eligibility

As noted above, the parties disagree on the eligibility for unit inclusion of the 14 employee classifications discussed below.

Aircraft Maintenance Analysis Technician, GS-9

The Activity asserts the employee in this position is a management official and/or a supervisor. The record reveals that this position is located in the Analysis Section of Aircraft Maintenance. The incumbent is responsible for the preparation of a monthly analysis of maintenance production performance and other related duties as assigned by the Chief of Maintenance. In performing his job functions, the record establishes that the incumbent follows prescribed guidelines established by higher authority. To accomplish his primary mission, the Aircraft Maintenance Analysis Technician gathers maintenance data, makes the necessary computations, analyzes the results, and places such results in the proper format. Further, upon request, he provides necessary information about various aspects of the analysis at staff meetings. The record indicates that the incumbent does not make recommendations based on his analysis which would affect the status of other employees or which would extend to the development of policy affecting the mission or organization of the Activity.

Under the foregoing circumstances, I find that the incumbent's role is essentially that of an expert or professional rendering resource information as distinguished from an individual actively involved in the ultimate determination of what policy should in fact be. Accordingly, I conclude that an employee in this classification is not a management official within the meaning of the Order. 4/ Nor is the

4/ Cf. Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135.

employee a supervisor as any authority he may possess is exercised with respect to only one employee, a subordinate in his section having the same job title but a lower grade designation. 5/

Aircraft Loadmaster (Instructor), GS-9

The Aircraft Loadmaster, GS-9, is an ART position located in the Flying Training Branch of the Operations and Training Division. The purpose of this position is to administer, schedule, and conduct flight and ground training for assigned reserve loadmasters, train mobile aerial port teams, and perform loadmaster duties. The incumbent also administers flight checks and works under the general supervision of the Operations and Training Officer.

The Activity contends that the employee in this position is a supervisor within the meaning of the Order. In this regard, the record reveals that while the incumbent exercises no authority over civilian employees, he does have certain responsibilities with regard to a total of approximately 38 active-duty reservists, of whom at least two are under his direction each day. His responsibilities with regard to these individuals include the following: (1) the assignment of military ratings after performance evaluations have been completed on each reservist; (2) the determination as to what work will proceed and who will perform it; (3) the implementation of the loadmaster training program and the scheduling of loadmasters; and (4) recommendations to the Operations and Training Officer concerning whether individuals meet the necessary qualifications for the loadmaster position. The record further indicates that while the incumbent's evaluations are not always followed, such recommendations are given great weight and, at least in one instance, a negative determination by the incumbent was followed. Moreover, testimony reveals that, except for occasional conferences, the incumbent works independently of his immediate supervisor and runs his section more or less as he sees fit. Additionally, the record establishes that the incumbent attends monthly supervisory meetings which are attended also by, among others, the Operations and Training Officer, the Chief of Maintenance, and an official from the personnel office. The incumbent performs the above functions with respect to active-duty military personnel on a regular, recurring basis while in his civilian status.

In Department of the Air Force, McConnell Air Force Base, Kansas, A/SLMR No. 134, I found that in determining the supervisory status of certain individuals, it was immaterial whether supervisory authority was exercised over unit or non-unit employees, or over "persons," such as military personnel, who are not "employees" within the

5/ In United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, A/SLMR No. 120, I concluded that employees are not supervisors within the meaning of the Executive Order when the supervisory authority they exercise is limited to one employee.

meaning of Section 2(b) of the Order. Rather, I concluded that supervisory status is determined by the duties performed by the alleged supervisor as distinguished by the type of personnel working under him. In the instant case, the record is clear that the Aircraft Loadmaster Instructor GS-9 meets the criteria for supervisory status in that he possesses independent and responsible authority to direct other persons (active-duty reservists), has the power to make performance evaluations, and has made effective recommendations materially affecting the status of the active-duty reservists assigned to his section. Accordingly, this classification will be excluded from the unit found appropriate.

Aircraft Loadmaster (Instructor), GS-8

The Aircraft Loadmaster (Instructor), GS-8, is an ART position located in the Flying Training Branch of the Operations and Training Division. Although only one of the two incumbents in this position has the authority to perform flight checks, the record reveals that they both have essentially the same duties while functioning in their civilian capacity. Such duties include administering, scheduling and conducting flight and ground training for assigned reserve loadmasters and the performance of regular loadmaster duties. Their immediate supervisor is the Operations and Training Officer and they are not supervised in any fashion by the Aircraft Loadmaster Instructor, GS-9.

Although the Activity alleges that the employees in the above classification are supervisors, the record indicates that the incumbents follow established guidelines in their training function and do not attend supervisory meetings on a regular basis, interview for hiring, make effective recommendations for promotions or in-grade raises, adjust grievances, or administer discipline. In addition, the record indicates that when either incumbent is in flight status, he performs his functions as part of the crew and, as such, is under the direction of the Aircraft Commander. Finally, the record reveals that while in civilian status, neither incumbent performs the supervisory functions over reservists which are performed by the Aircraft Loadmaster Instructor, GS-9, described above.

Based on the foregoing, I conclude that the Aircraft Loadmaster Instructors, GS-8, are not supervisors within the meaning of the Order. Therefore, employees in this classification should be included in the unit.

Flight Engineer (Instructor), GS-9

The position of Flight Engineer (Instructor) is an ART position in the Flying Training Branch of the Operations and Training Division. The two incumbents in this position are responsible directly to the Operations and Training Officer. The principal focus of the incumbents' duties is the Flight Engineer Training Program, which is a program designed to train and produce competent flight engineers for the

Activity, and which includes both reserve and civilian flight engineers. The record reveals that the Flight Engineer Instructors provide this type of training when there has been a change of mission, a change in unit equipment or aircraft, or an assignment of new personnel, either civilian or military. Such occurrences, ordinarily, do not take place more than once or twice a year. The record indicates that the Flight Engineer Instructors spend approximately 50 percent of their time in preparation for and actual instruction to flight engineers. The remainder of their time is divided between their duties as regular flight engineers and clerical or administrative functions relating to the training, standardization/evaluation checks, and scheduling of other flight engineers.

The Activity alleges that because the incumbents implement the Flight Engineer Training Program and are consulted, in this respect, by the Operations and Training Officer, the flight scheduling staff, and the group and wing commanders, they are management officials and should be excluded from the unit. In this connection, the record reveals that while the incumbents attempt to develop the content of the training program and determine how and when such training is to be given to flight engineers, their control over such matters is limited. Thus, in the preparation of lesson plans, the record shows that the incumbents read and research Air Force manuals, technical orders, regulations, and flight manuals to acquire a general knowledge of the particular system involved, instrumental to the preparation of an outline from which they can instruct. However, such lesson plans are reviewed thoroughly by the Operations and Training Officer.

The foregoing facts convince me that the incumbents' role in the implementation of the Flight Engineer Training Program is that of an expert rendering resource material, and that, accordingly, the employees in this classification are not management officials within the meaning of the Order. 6/

The Activity contends also that the above incumbents are supervisors within the meaning of the Order. In this connection, the record shows that although the Flight Engineer Instructors perform standardization/evaluation checks on other regular flight engineers (ART's) at the Activity, they merely report the results to their immediate supervisor, who then acts upon this information in accordance with established guidelines. Moreover, the incumbents exercise no authority over these same ART's with respect to hiring, transfers, suspensions, lays offs, recalls, promotions, dismissals, assignments, rewards, or discipline; do not direct the work of these individuals or adjust their grievances; and do not effectively recommend any of the above actions. While, based on the foregoing, the record shows that the incumbents do not exercise any supervisory authority over

6/ Cf. Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, cited above.

ART's who are regular civilian flight engineers of the Activity, it is apparent that the incumbents exercise some authority with regard to active-duty reservists. Thus, it appears that, to some extent, they make work assignments, evaluate flight engineer's performance, and recommend such actions as hiring, promotions, and discharges with respect to active-duty reservists. However, the record does not contain sufficient facts upon which to determine whether the incumbents perform these functions with regard to active-duty reservists on a regular, recurring basis, or whether such authority is merely exercised intermittently and on an infrequent basis. Under these circumstances, I am unable to make a finding with regard to the supervisory status of the Flight Engineer Instructors.

Public Information Officer

The Public Information Officer is directly responsible to the Group Commander. The purpose of this civilian position is to develop internal and external information programs and to establish and maintain effective relations with local communities and with the public at large. Toward this end, the incumbent publishes a monthly newspaper wherein he writes editorial copy under the by-line of the Commander and, additionally, publishes annual information brochures which are used in unit briefings. The employee in this position also writes news releases and acts as the unit photographer.

While the record is clear that no supervisory duties are performed by the incumbent, the Activity maintains that the employee in this classification should be excluded from the unit on the basis that he is a management official. In this connection, the record shows that the incumbent, in essence, determines the Activity's public information policy, as it applies locally, with some assistance from higher level directives. In this connection, the incumbent attends high level staff meetings and works in close concert with the Commander. The record further reveals that the Group Commander usually approves the incumbent's policy recommendations.

Based on the foregoing, I find that the Public Information Officer does not share a community of interest with the employees in the unit found appropriate. Rather, the record indicates that the functions assigned to the incumbent place the interests of an employee in this classification more closely with personnel who formulate, determine and oversee policy than with personnel who carry out the resultant policy. 7/ Moreover, the foregoing facts convince me that the incumbent actively participates in the ultimate determination of policy and, as a result, his inclusion in the unit could result in a conflict or apparent conflict of interest within the meaning of Section 1(b) of the Order. Accordingly, I find that the Public

7/ See The Veterans Administration Hospital, Augusta, A/SLMR No. 3.

Information Officer is a management official within the meaning of the Order and, as such, shall be excluded from the unit found appropriate.

"Shop Chiefs" 8/

The following eight job classifications, all of which are either in the Organizational Maintenance Branch or the Field Maintenance Branch, are considered together because, while each classification involves different functions, all of the incumbents perform as "shop chiefs" within their particular area or shop: Aircraft Electrician, WG-12; Aircraft Hydraulic Systems Mechanic, WG-12; Aircraft Instrument and Control Systems Mechanic, WG-12; Sheet Metal Mechanic (Aircraft), WG-12; Aircraft Propeller Mechanic, WG-12; Aircraft Mechanic, WG-12; Aircraft Mechanic Leader, WL-10; and Aircraft Jet Engine Mechanic Leader, WL-10. The Activity contends that the duties performed by the above employees in their capacity as "shop chiefs" are supervisory in nature and that their exclusion from the unit on this basis is warranted.

The record reflects that the responsibilities of the various "shop chiefs" are essentially the same and that the difference in grade levels is based solely on the number of employees in each shop. Each "shop chief" is the custodian of property, special tools, and equipment in his shop, and for the accuracy of all maintenance documents. Although the incumbents have responsibility for making job assignments within their respective shops as the work is called down from the maintenance control section, the record indicates that the incumbents' selection of employees for such work is based on the availability of employees, and thus involves limited discretion. In performance of their duties the shop chiefs, when requested, inspect other employees' work in progress, or when completed, and also sign to indicate the work has been inspected and is considered safe.

The record reveals that the "shop chiefs" work along with other employees in their area and that most procedures in each section are routine, periodic, and require little, if any, direction. In this connection, each employee is highly qualified, knows what is expected of him and performs his job in accordance with work guidelines and specific requests. In this sense, the activities of the "shop chiefs" are strictly prescribed and leave little room for the exercise of independent judgment. The record shows also that the "shop chiefs" do not complete written, formal evaluations of the employees under them, do not approve annual or sick leave requests, and do not recommend new hires, dismissals, transfers or promotions. Moreover,

8/ The "shop chiefs" in this case involve employees performing different functions from the employees designated as "shop chiefs" in New Jersey Department of Defense, A/SLMR No. 121.

the incumbents are not authorized to discipline or adjust grievances of employees and they do not attend any supervisory meetings.

Under the foregoing circumstances, I find that the "shop chiefs" are not supervisors within the meaning of the Order. Accordingly, the employees in the above-named classifications should be included in the unit found appropriate.

Warehouseman Leader, WL-6

This position is located in the Materiel Facilities Branch. The incumbent provides assistance to the Materiel Facilities Foreman, who gives him written and verbal instructions and checks his performance periodically for quality and the achievement of established objectives. The Warehouseman Leader fills in for the Materiel Facilities Foreman when the latter is on annual leave, which occurs approximately once a year.

The record establishes that the incumbent receives specific work assignments for each of the five employees in his section from his immediate supervisor on a daily basis. When necessary, the incumbent works along with the men on tasks which may be characterized as routine. In addition, the incumbent has occasional informal meetings with his supervisor wherein work assignments are discussed. The record reveals that in most areas, the incumbent's activities are strictly prescribed and require limited use of independent judgment. Moreover, the record clearly indicates that the employee in this classification has no authority to assign performance ratings to his employees, to approve annual or sick leave requests, or to recommend new hires, dismissals, transfers or promotions.

In light of the above facts, I find that the employee in this classification is not a supervisor within the meaning of the Order, and should be included in the unit.

Based on all of the foregoing, 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 employees 9/ of the 926th Tactical Airlift Group, United States Air Force Reserve, located on the Naval Air Station, Belle Chasse, Louisiana, including the classifications of Aircraft Electrician, WG-12; Aircraft Hydraulic

9/ The record indicates that there are several "temporary" employees at the Activity who have a reasonable expectancy of continued employment. All parties agree they should be included within any unit found appropriate. As the record supports the position of the parties, I find these employees share a clear and identifiable community of interest with other employees in the unit found appropriate and should be included in the unit.

Systems Mechanic, WG-12; Aircraft Instrument and Control Systems Mechanic, WG-12; Aircraft Jet Engine Mechanic Leader, WL-10; Aircraft Loadmaster (Instructor), GS-8; Aircraft Maintenance Analysis Technician, GS-9; Aircraft Mechanic, WG-12; Aircraft Mechanic Leader, WL-10; Aircraft Propeller Mechanic, WG-12; Sheet Metal Mechanic (Aircraft), WG-12; and Warehouseman Leader, WL-6, excluding Aircraft Loadmaster (Instructor), GS-9, Public Information Officer, professional employees 10/, employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees, management officials, and supervisors and guards as defined in the Executive Order. 11/

10/ During the hearing, the parties stipulated that the Civil Engineer, GS-11, is a professional employee. However, the stipulation and record do not indicate that the requirements of this position meet the established criteria for professional employee status set forth in Department of Interior, Bureau of Land Management, Riverside District and Land Office, A/SLMR No. 170. In these circumstances, I make no findings as to the professional status of this classification.

11/ During the hearing, the parties stipulated to the effect that certain employees in the following categories should be excluded from the unit: (1) some 38 employees who are supervisors and/or management officials; (2) full-time guards (4 in number); (3) confidential employees, i.e., a personnel clerk, GS-5, and a secretary steno, GS-5, who work for, respectively, the Personnel Management Specialist and the Commander. I find that each of the above stipulations is fully supported by the record and, therefore, shall exclude these employees from the unit found appropriate. I shall also exclude, as requested by the parties, a clerk-steno, GS-4, who, while under the jurisdiction of the Activity's personnel office, is not employed by the Activity and is not located at Belle Chasse. In addition, the parties stipulated that two military personnel clerks, GS-4, and a military personnel technician, GS-7, should be included in the above unit because they are not confidential employees. As the record supports such a finding, I find that the employees in these classifications should be included in the unit.

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 all 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 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 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 513, Independent.

Dated, Washington, D.C.
November 30, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

November 30, 1972

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 OCEAN SURVEY,
PACIFIC MARINE CENTER AND
ATLANTIC MARINE CENTER
A/SLMR No. 222

The Petitioner, National Maritime Union of America, AFL-CIO, sought an election in a unit composed of all of the Activity's chief quartermasters. The Activity agreed on the scope of the claimed unit but contended that the petition should be dismissed because the unit sought is, in effect, a unit of supervisors which the Petitioner is ineligible to represent under the Executive Order. While the Petitioner did not concede that the chief quartermasters are supervisors, it contended that even if they are supervisors, they are eligible for representation by Petitioner based on Section 24(2) of the Executive Order, which permits the according of initial recognition for units of supervisors to labor organizations which historically or traditionally represent such units of supervisors in private industry and which held exclusive recognition for units of such supervisors in any agency on the date of the Executive Order, January 1, 1970.

The Assistant Secretary determined that the chief quartermasters are supervisors within the meaning of the Order because they assigned and directed the work of lower grade quartermasters and had the authority to recommend effectively such personnel actions as hiring, firing, and disciplining of lower grade quartermasters. The Assistant Secretary further determined that inasmuch as the chief quartermasters were supervisors and inasmuch as the Petitioner did not hold exclusive recognition for a unit of chief quartermasters or supervisors performing the same duties as the chief quartermasters in any agency on the date of the Executive Order, the Petitioner was ineligible under Section 24(2) of the Executive Order to represent exclusively a unit of chief quartermasters. Accordingly, the Assistant Secretary dismissed the petition.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NATIONAL OCEAN SURVEY,
PACIFIC MARINE CENTER AND
ATLANTIC MARINE CENTER

Activity

and

Case No. 22-3483(RO)

NATIONAL MARITIME UNION OF AMERICA,
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 Donald K. Clark. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including the Petitioner's brief, the Assistant Secretary finds:

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

2. The Petitioner, National Maritime Union of America, AFL-CIO, seeks an election in a unit of all chief quartermasters aboard vessels operated by the Activity at its Pacific and Atlantic Marine Centers, excluding all other employees, managers, professional employees, persons performing personnel work in other than a purely clerical capacity, guards and supervisors as defined in the Order. The Activity agrees with the scope of the unit sought but contends that the petition should be dismissed because the claimed unit is composed of supervisors and, therefore, is prohibited by the Executive Order. While the Petitioner does not concede that the employees it

seeks to represent in this matter are supervisors it contends that even if they are supervisors, they would be eligible for exclusive representation under the provisions of Section 24(2) of the Order. 1/

The Activity is a component of the National Oceanic and Atmospheric Administration (NOAA) which is an operating component of the Department of Commerce. It is engaged primarily in researching domestic and foreign deep sea waters and, in this connection, operates a total of 11 deep sea vessels, each of which employs one chief quartermaster. 2/ The Activity's operations are divided into several principal operating units, including the Atlantic Marine Center, which is headquartered at Norfolk, Virginia and the Pacific Marine Center, headquartered at Seattle, Washington, out of which the deep sea vessels operate.

The Marine Centers report to the Activity's Director and his administrative staff who, in turn, report to the Administrator of NOAA. The Atlantic Marine Center has its own personnel office which is responsible for all personnel services within its jurisdiction. On the other hand, personnel services for the Pacific Center are conducted by the Northwest Administrative Services Offices which report directly to NOAA's Assistant Administrator for Administration who has overall responsibility for the administration and personnel services of the Activity as well as other components of NOAA. The record reveals that personnel procedures and policies applicable to quartermasters are uniform for both of the Marine Centers.

The crews on each of the 11 vessels involved herein include a Commanding Officer, an Executive Officer, and a Navigation and Operations Officer who are commissioned officers and who have overall responsibility for the operation of their respective vessels. The crews on the ships are divided into eight departments, including a quartermaster's department, and each is supervised by a separate department head. The department heads, designated as "wage marines," report to the Executive Officer and the Navigation and Operations Officer for technical direction and supervision. Each of the quartermaster's departments involved herein employs from two to four quartermasters and a chief quartermaster.

1/ Section 24 of the Order provides, in part: "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."

2/ The National Marine Fisheries Service, which is also a component of NOAA, operates additional vessels but such vessels do not employ chief quartermasters.

The duties of a chief quartermaster consist primarily of directing the lower grade quartermasters in the performance of their duties. Such duties include maintaining and cleaning the bridge, pilothouse and the surrounding areas; acting as helmsmen; assisting in the preparation of navigational charts; and standing look-out watches. In this connection, a chief quartermaster prepares duty rosters and performance reports for the lower grade quartermasters. Also, he assists the officer of the deck and navigators, acts as helmsmen in constricted waters or in the absence of quartermasters, keeps navigational charts and other navigational aids on a current basis, and maintains the vessel's navigation equipment. In addition, the chief quartermaster has authority to recommend effectively hiring, firing and the disciplining of lower grade quartermasters, he evaluates the quartermasters for promotion, and serves as the first step in the Activity's grievance procedure for the quartermaster's department. Finally, the chief quartermaster attends supervisory meetings and shares the same living quarters and dining facilities as other supervisory personnel on the vessels, which facilities differ from those available to nonsupervisors. In these circumstances and noting particularly the fact that the chief quartermasters have the authority to recommend effectively hiring, firing and the disciplining of lower grade quartermasters, as well as the authority to direct effectively the work of such employees, I find that they are supervisors within the meaning of Section 2(c) of the Executive Order.

As stated above, the Petitioner contends that even if the chief quartermasters are found to be supervisors, they would be eligible for exclusive representation under the savings clauses contained in Section 24(2) of the Executive Order.

In this regard, while the Petitioner contends that consistent with Section 24(2) it is a labor organization which has historically or traditionally represented chief quartermasters in private industry, it concedes that it did not represent a unit of chief quartermasters in any agency on January 1, 1970, as required by Section 24(2). Nevertheless, the Petitioner contends that it meets the latter requirement based on the fact that on January 1, 1970, another traditional maritime labor organization--the Masters, Mates and Pilots--represented a unit of licensed deck officers in the Federal sector. It asserts in this regard that such employees are proper counterparts of the chief quartermasters because they perform the same duties as the chief quartermasters.

The evidence discloses that the chief quartermasters in issue are the only employees employed in the Federal sector who are designated as chief quartermasters. 3/ It further appears that the functions

3/ It appears that only one vessel--the USS United States--in the private sector carries the classification of chief quartermaster and that vessel is not in operation at the present time.

performed by chief quartermasters are necessary to the operation of any deep sea vessel and that such functions are, in fact, performed on other deep sea vessels in both the private and public sectors by employees classified as licensed deck officers. 4/

The evidence establishes that the Petitioner served as the exclusive bargaining representative of the chief quartermasters aboard the USS United States during the time that vessel was in operation. It appears, therefore, that the Petitioner is a labor organization, which has historically or traditionally represented chief quartermasters in private industry within the meaning of Section 24(2) of the Order. However, the evidence establishes also that the Petitioner did not hold exclusive recognition for a unit of chief quartermasters or licensed deck officers on January 1, 1970, the date of the Executive Order. As noted above, the Petitioner asserts that the provision in Section 24(2)--which requires the labor organizations seeking to represent supervisors must have held exclusive recognition for units of such supervisors in the Federal sector on the date of the Order--is satisfied by the fact that another maritime labor organization, which traditionally or historically represented such supervisors, held exclusive recognition for a unit of comparable supervisors on the date of the Order. Thus, the Petitioner argues that it is eligible to represent the chief quartermasters herein because it can show that the Masters, Mates and Pilots Union exclusively represented a unit of such employees in the Federal sector on the date of the Order. I do not agree. In my view, Section 24(2) requires a labor organization which seeks a unit of management officials or supervisors to be one which (1) has historically and traditionally represented such management officials or supervisors in private industry, and (2) represented exclusively units of such officials or supervisors in the Federal sector on the date of the Executive Order. As the Petitioner clearly does not meet the second requirement of Section 24(2), I find that it is not eligible to represent the unit of chief quartermasters sought in the instant case. Accordingly, I shall dismiss the petition herein.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 22-3483(RO) be, and it hereby is, dismissed.

Dated, Washington, D. C.
November 30, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

4/ The licensed deck officers are also referred to as mates.

December 4, 1972

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

NASA, KENNEDY SPACE CENTER,
KENNEDY SPACE CENTER, FLORIDA
A/SLMR No. 223

This case involves an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO (Complainant), against NASA, Kennedy Space Center, Kennedy Space Center, Florida (Respondent), alleging that NASA violated Section 19(a)(6) of Executive Order 11491 by informing the Complainant on April 30, 1971, that the Respondent would implement changes in its Medical and Environmental Health Program at Kennedy Space Center and by refusing to negotiate these changes with the Complainant, which changes conflicted with the terms of the parties' collective-bargaining agreement.

The Respondent contended that the parties' collective-bargaining agreement was not changed by its revision of the Kennedy Management Instruction (KMI) with regard to employee medical clearance requirements, and that the new KMI provision was not in conflict with the agreement. In these circumstances, the Respondent contended that its only obligation under the agreement was to consult with the Complainant, and that it had fulfilled this obligation.

The Respondent moved to dismiss the complaint for lack of jurisdiction, contending that the Assistant Secretary, by virtue of Section 13(a) of the Order, as amended, had no jurisdiction because the dispute herein involved a matter of contract interpretation or application which should be handled under the parties' contractual grievance procedure. Specifically, the Respondent maintained that the issue herein involved a question over the interpretation or application of the "in conflict" language contained in Article III, Section 7, of the parties' collective-bargaining agreement.

The Assistant Secretary adopted the Hearing Examiner's recommendation that the motion to dismiss the complaint for lack of jurisdiction be denied. The Assistant Secretary noted that in Report on a Ruling of the Assistant Secretary, Report No. 49, he had stated that where a complaint involves essentially a disagreement over the interpretation of an existing collective-bargaining agreement which provides a procedure for resolving the disagreement, the parties should pursue their contractual rather than unfair labor practice remedies. However, he stated that no withdrawal of jurisdiction was intended in those situations where, as here, at issue is the question whether a party to an agreement has given up rights granted under the Order.

In agreement with the Hearing Examiner, the Assistant Secretary found that the KMI revision did not conflict with the existing sick leave provision in the parties' negotiated agreement, but rather that it constituted a new term or condition of employment for employees in the bargaining unit. In the Assistant Secretary's view, the foregoing conclusion necessarily leads to the question of the Respondent's obligation, if any, to negotiate with the employees' exclusive bargaining representative on the matter involved.

The Assistant Secretary rejected the Hearing Examiner's finding that the Complainant waived the right to negotiate on the institution of new terms and conditions of employment with respect to bargaining unit employees during the life of the parties' agreement. He noted in this regard that the provisions of the parties' collective-bargaining agreement dealing with the rights of the Employer and the rights of the Union, when read together, did not show clearly and unmistakably that the Complainant waived its right to negotiate. As a result, the Assistant Secretary found that the Respondent was required to negotiate with the Complainant before implementing the KMI revision.

In agreement with the Hearing Examiner, the Assistant Secretary found that in the period after the Respondent advised the Complainant of its intention to put into effect the KMI revision, each party sent approximately 8 letters to the other, and 5 meetings between the parties took place. Further, the Respondent, on numerous occasions, requested that Complainant submit any suggestions it had for changes in the proposed revision and, in fact, the Respondent made several changes based upon the requests and suggestions submitted by the Complainant.

In the context of these events, the Assistant Secretary found that the proposed revision was discussed fully by both parties and that as a practical matter -- regardless of what the parties considered their conduct to be -- the parties did, in fact, engage in negotiations regarding the proposed KMI revision. Accordingly, the Assistant Secretary found that the Respondent satisfied its obligation to negotiate with the Complainant on the proposed revision and, in agreement with the Hearing Examiner, ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NASA, KENNEDY SPACE CENTER,
KENNEDY SPACE CENTER, FLORIDA

Respondent

and

Case No. 42-1762 (CA-26)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, (AFL-CIO)

Complainant

DECISION AND ORDER

On June 30, 1972, Hearing Examiner William Naimark issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practice alleged, and recommending that the complaint be dismissed. Thereafter, the Complainant filed exceptions to the Hearing Examiner's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Hearing Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Hearing Examiner's Report and Recommendations, and the entire record in this case, including the exceptions and a supporting brief filed by the Complainant, I hereby adopt the Hearing Examiner's Report and Recommendations to the extent consistent herewith.

The complaint in the instant case was filed on October 1, 1971, by the Complainant, the American Federation of Government Employees, AFL-CIO, on behalf of its Local 2498, against the Respondent, NASA, Kennedy Space Center, Kennedy Space Center, Florida. It alleged that the Respondent violated Section 19(a)(6) of Executive Order 11491 by informing the Complainant on April 30, 1971, that the Respondent

would implement changes in its Medical and Environmental Health Programs at Kennedy Space Center (KSC) and by refusing to negotiate these changes with the Complainant. 1/

In essence, the Complainant argues that the Respondent violated Section 19(a)(6) of the Order by its refusal to negotiate concerning a revision of KMI in connection with employee medical clearance requirements. It asserts that such revision, in effect, modified the parties' collective-bargaining agreement.

The Respondent, on the other hand, contends that the parties' collective-bargaining agreement was not changed by the KMI revision and that the new KMI provision is not in conflict with the agreement. The Respondent contends that its only obligation under the agreement in this regard was to consult with the Complainant, and that it fulfilled this obligation.

The Respondent moved to dismiss the complaint for lack of jurisdiction, contending that the Assistant Secretary, by virtue of Section 13(a) of the Order, as amended, has no jurisdiction because the dispute herein involves a matter of contract interpretation or application which should be handled under the parties' contractual grievance procedure. Specifically, the Respondent maintains that the issue herein involves a question over the interpretation or application of the "in conflict" language contained in Article III, Section 7 of the parties' collective-bargaining agreement. 2/

The Hearing Examiner concluded that the agreement language specifically referred to by the Respondent was neither ambiguous nor unclear, stating that the term "in conflict" is not couched in indefinite or uncertain language. Thus, he reasoned that the parties' dispute did not involve a matter of interpretation of the agreement based on ambiguous language and, therefore, recommended denial of the motion to dismiss the complaint for lack of jurisdiction.

1/ In its brief, the Complainant further contends that the revision of the Kennedy Management Instruction (KMI), subsequently set forth in the KSC Bulletin issues of October 29, 1971 and November 5, 1971, conflicted with the terms of the parties' collective-bargaining agreement. As the Complainant did not amend its complaint to include such post-complaint conduct, I find it unnecessary to pass upon whether the alleged conduct was in violation of the Order.

2/ Article III, Section 7 provides: "The Employer agrees that personnel policies which are within local discretionary authority will not be changed or implemented without prior negotiations with the Union when they are in conflict with this Agreement."

Based on the facts overall, I agree with the Hearing Examiner's recommendation in this regard. I have stated previously that where a complaint involves essentially a disagreement over the interpretation of an existing collective-bargaining agreement which provides a procedure for resolving the disagreement, the parties should pursue their contractual rather than unfair labor practice remedies. 3/ By this policy statement, however, no withdrawal of jurisdiction was intended in those situations where at issue is the question whether a party to an agreement has given up rights granted under the Order. Here, the paramount issue is the waiver of a right granted under the Order--that is, the right to negotiate over employee medical clearance requirements. Under these circumstances, I adopt the Hearing Examiner's recommendation to deny the Respondent's motion to dismiss the complaint for lack of jurisdiction under Section 13(a) of the Order, as amended.

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

On January 13, 1971, the Respondent wrote a letter to the Complainant advising it of the proposed revision of the KMI in connection with the Medical and Environmental Health Programs of the KSC and requesting comments thereon. In essence, the proposal provided that employees who have been on sick leave for more than three working days may not return to duty until they receive a medical clearance, including such physical examination as is necessary from the Occupational Health Facility (OHF). In addition, it provided that an employee who was hospitalized or who had been on extended sick leave be required to furnish a statement to the KSC physician from his personal physician indicating that he was released to return to duty. The Complainant replied on January 14, 1971, stating that the proposed revision of KMI was in conflict with the sick leave provision of the negotiated agreement and should not be implemented. The Complainant also requested that the procedures under the contract for negotiating amendments and/or changes be followed. The evidence establishes that during the next six months the parties exchanged numerous letters concerning the proposed KMI revision and, in addition, held meetings on five separate occasions to discuss the problems involved. Throughout this period, the Complainant consistently took the position that the proposed revision was in conflict with the negotiated agreement and that the Respondent was bound to negotiate the matter under the terms of the agreement. On the other hand, the Respondent repeatedly asserted that the KMI revision was not in conflict with the parties' negotiated agreement and that under the terms

3/ See Report on a Ruling of the Assistant Secretary, Report No. 49.

of the agreement it was required only to consult with the Complainant. Despite its stated position on the requirement to negotiate, the Complainant made several suggestions and counter-proposals in response to requests or proposals advanced by the Respondent, several of which were adopted by the Respondent and incorporated into the final KMI revision.

In agreement with the Hearing Examiner, I find that the KMI revision does not conflict with the existing sick leave provision in the negotiated agreement. Thus, the revision does not in any way change or take away rights granted under the agreement but, by requiring a medical clearance, it imposes a new and different obligation upon an employee who is absent on sick leave. In this regard, consistent with the Hearing Examiner's conclusion, I find that while such change did not conflict with the parties' agreement, it did, in fact, constitute a new term or condition of employment for employees in the bargaining unit which necessarily leads to the question of the Respondent's obligation, if any, to negotiate with its employees' exclusive bargaining representative on such matter.

The Hearing Examiner concluded that, under the negotiated agreement, the Complainant had waived its right under Section 11(a) of the Order to insist upon negotiation over changes in conditions of employment except as set forth in Article III, Section 7. In my view, in order to establish a waiver of a right granted under the Executive Order, such waiver must be clear and unmistakable. Thus, a waiver will not be found merely from the fact that an agreement omits specific reference to a right granted by the Executive Order, or that a labor organization has failed in negotiations to obtain protection with respect to certain of its rights granted by the Order. In finding a waiver in this case, the Hearing Examiner limited his consideration to Article III, Sections 1 4/ and 7 which pertain to obligations of the Employer. However, he failed to consider Article V, Section 7 which pertains to the rights of the Union to negotiate with the Employer in situations where amendment of the parties' agreement may be warranted. 5/ In my view, when read together, these provisions do not show clearly and unmistakably that the Complainant waived its right to negotiate on the

4/ Article III, Section 1 provides: "The Employer is obligated to consult with the Union concerning personnel policies, the personnel implications of certain management decisions, and on matters directly affecting working conditions." (Emphasis supplied)

5/ Article V, Section 7 provides: "It is the right of the Union to negotiate with the Employer on matters of local discretion which may amend the provisions of this Agreement and to present its views to the Employer at any time on any matter...Formal amendments required to modify the provisions of this Agreement will be processed for approval consideration in the same manner for approval of this basic Agreement." (Emphasis supplied)

institution of new terms and conditions of employment on bargaining unit employees. Under these circumstances, I reject the finding of the Hearing Examiner that the Complainant waived its right to negotiate in this regard during the life of the parties' agreement and find that the Respondent was required to negotiate with the Complainant before implementing the KMI revision.

The evidence establishes that during the period in which the parties were exchanging letters and meeting on the KMI revisions, the Complainant consistently took the position that such conduct by the parties did not constitute negotiations and that the Respondent should follow the requirements for changes as enumerated in the negotiated agreement. On the other hand, the Respondent consistently contended that it was obligated only to consult with the Complainant.

A review of all of the evidence reveals that in the period after the Respondent advised the Complainant of its intention to put into effect the KMI revision each party sent approximately 8 letters to the other and 5 meetings between the parties took place. Further, the Respondent, on numerous occasions, requested the Complainant to submit any suggestions it had for changes in the proposed revision. And, as noted above, during this period the Respondent made several changes based upon the requests and suggestions submitted by the Complainant.

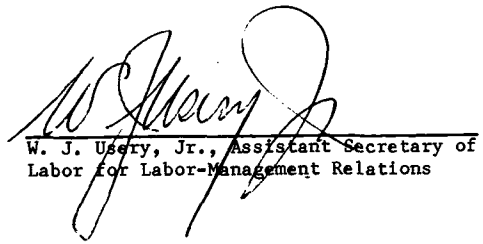
In the context of these events, it is clear that the proposed revision was discussed fully by both parties and that as a practical matter--regardless of what the parties considered their correspondence, proposals and discussions concerning the revision to be--the parties did, in fact, engage in negotiations regarding the proposed KMI revision. 6/ Under these circumstances, I find that the Respondent satisfied its obligation to negotiate with the Complainant on the proposed revision. Accordingly, in agreement with the Hearing Examiner, I shall order that the complaint herein be dismissed.

6/ The Hearing Examiner noted that "although there was no negotiation leading to a written agreement on the subject, Respondent in fact, 'negotiated' the matter with the Union." In this connection, if an agreement had been reached, upon request of the Complainant, the Respondent would have been required to execute a written agreement or memorandum of understanding. Cf. Headquarters, United States Army Aviation Systems Command, A/SLMR No. 168.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 42-1762 (CA-26) be, and it hereby is, dismissed.

Dated, Washington, D. C.
December 4, 1972



W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF THE HEARING EXAMINERS
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
WASHINGTON, D. C.

NASA, KENNEDY SPACE CENTER
KENNEDY SPACE CENTER, FLORIDA

Respondent

and

CASE NO. 42-1762 (CA 26)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (AFL-CIO)

Complainant

Edward F. Parry, Deputy Chief Counsel,
Code CC, Kennedy Space Center, Florida 32899,
and
William J. Holm, Labor-Management Relations
Officer, Kennedy Space Center, Florida 32899,
for the Respondent

Gary B. Landsman, Assistant to the Staff Counsel,
American Federation of Government Employees,
400 First Street, N. W., Washington, D. C. 20001,
and
Claude E. Wolfe, President, AFGE Local 2498, Box 2102,
Kennedy Space Center, Florida 32815, for the
Complainant

Before: William Naimark, Hearing Examiner

REPORT AND RECOMMENDATIONS

Statement

The proceeding herein arose under Executive Order 11491 (herein called the Order) pursuant to a Notice of Hearing on

Complaint issued on March 20, 1972, by the Regional Administrator of the United States Department of Labor, Labor-Management Services Administration, Atlanta Region.

American Federation of Government Employees, AFL-CIO, (herein called the Complainant) initiated this case by filing a complaint on October 1, 1971, on behalf of its Local 2498 (herein called the Union) against NASA, Kennedy Space Center, Kennedy Space Center, Florida (herein called the Respondent). The complaint alleged that Respondent violated Section 19(a)(6) of the Order by informing the Union President on April 30, 1971, that management would implement changes to its Medical and Environmental Health Programs at Kennedy Space Center (herein referred to as KSC), and by refusing to negotiate these changes with the Union which were allegedly in violation of certain articles of the agreement between the Union and Respondent. 1/

Prior to the hearing, Respondent filed two motions with the Assistant Secretary herein. Motion No. 1 was to dismiss the complaint for lack of jurisdiction. It was contended by Respondent that the Assistant Secretary, by virtue of Section 13(a) of the Amended Order, had no jurisdiction since the dispute involved a matter of contract interpretation or application which required resolution by way of the grievance procedure under the contract. Motion No. 2 requested the Assistant Secretary to recall this case from the Regional Administrator and either decide it on the basis of the record, or remand the matter in accordance with existing regulations, decisions and rulings of the Assistant Secretary. The basis of the second motion was that the Regional Administrator had not determined that a reasonable basis existed for the complaint, and hence a Notice of Hearing was not proper under Section 203.8 of the Rules and Regulations. Further, the "reversal" of the Regional Administrator's determination by the Assistant Secretary, upon a request for review, did not reflect that the Regional Administrator's determination had been replaced. Action by the Assistant Secretary took the form of a letter dated February 29, 1972, addressed to Dennis Garrison, Complainant's Vice President, 5th District, as follows:

1/ Respondent did, in fact, implement this revision to its Medical and Environmental Health Program on November 1, 1971, and published same in its Bulletin on October 29 and November 5, 1971. Complainant contends this implementation is likewise violative of Section 19(a)(6) of the Order.

> "I am of the opinion that the request for review raises issues which can be resolved best on the basis of record testimony. Accordingly, the Regional Administrator is directed to issue promptly a notice of hearing in this proceeding."

Thus Respondent contends there has been no determination by the Regional Administrator that a reasonable basis exists for a complaint, which is a prerequisite for a hearing.

On April 20, 1972, the Assistant Secretary of Labor sent a telegram to the parties and the Regional Administrator, stating that he declined to rule upon the motions since they were not addressed to the Regional Administrator as required under Section 203.18(a) of the Regulations. The telegram recited that Respondent could refile the motions with the Hearing Examiner. Although Respondent maintains it never received the wire, a copy of the telegram was sent to its counsel under date of May 4, 1972, and received by counsel on May 8, 1972. At the hearing Respondent requested the undersigned to consider the motions in his report and recommendations inasmuch as no word had been received as to the ruling of the Assistant Secretary. In view of the ruling by the Assistant Secretary and the request at the hearing by Respondent, the undersigned will make recommendations herein with respect to both of Respondent's motions.

Motion No. 1 involves a consideration of Section 13 of the Order, and will be treated later in this Report.

In respect to Motion No. 2, the undersigned finds no validity thereto. Respondent's contention that no determination has been made by the Regional Administrator of a reasonable basis for the complaint is rejected. The Notice of Hearing on Complaint specifically recites "it appearing in accordance with Section 203.8 of the regulations of the Assistant Secretary that a hearing should be held * * *." [Underscoring supplied] Thus, despite his earlier ruling, the Regional Administrator's Notice of Hearing carries with it the implication that a reasonable basis exists for the complaint. Accordingly, I recommend the Assistant Secretary deny Motion No. 2.

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A hearing was held before the undersigned on April 25, 1972, at Titusville, Florida. Both parties were represented by counsel, and were afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter, both the Union and the Complainant filed briefs which have been duly considered by the undersigned. 2 /

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

FINDINGS OF FACT

I. The Unfair Labor Practice

A. Introduction and Contentions

The Union and the Respondent are parties to a collective bargaining agreement 3 / signed on June 11, 1970, covering the Civil Service employees of the KSC. By its terms the contract remains in effect for three (3) years from its effective date. Article XVI of the contract which is entitled "Sick Leave," provides in Section 5 as follows:

> "Normally, absences in excess of three (3) working days must be supported by a doctor's certificate. In certain instances, it may be unreasonable to require such a certificate. In such cases, a signed statement by the employee stating the nature of his incapacity and the reasons why a certificate was not obtained may be accepted in lieu of a certificate. The certificate or other evidence of incapacity must be submitted to the employee's supervisor within one (1) week after return to duty." [Underscoring supplied]

2 / By motions dated May 10 and 15, 1972, the Complainant and Respondent, respectively, moved to correct the transcript in certain respects. The motions are granted and these corrections are attached hereto as Appendix A.

3 / AFGE Exhibit 1.

After considerable discussion with the Union commencing in January 1971, 4 / together with an exchange of correspondence -- which will be adverted to hereinbelow -- Respondent announced a new policy as to its Medical and Environmental Health Program. It took the form of a revision of the Kennedy Management Instruction (herein called KMI) and was set forth in the KSC Bulletin issues 5 / of October 29, 1971, and November 5, 1971. It provided as follows:

> "SICK LEAVE FOR FIVE OR MORE CONSECUTIVE WORK DAYS: NASA employees who have been on sick leave for five or more consecutive work days must receive a medical clearance (including such physical examination as is necessary) from the KSC Occupational Health Facility before returning to duty. It is desirable that medical clearance be obtained by employees who have been on sick leave for three consecutive workdays. When possible, arrangements for the clearance should be made by the employee's supervisor through the Personnel Management Assistance Branch, AD-PER-3, in advance of the expected date of return to work. The clearance process prior to return to duty described herein (including such examination as may be necessary) is not a 'fitness for duty' determination as discussed in S10-10 of the Federal Personnel Manual Supplement 831-1, and will not be the basis for permanent medical disqualification of an employee for his official position. (IS-MED/AD-PER)" [Underscoring supplied]

The Union herein maintained at the outset, and continues to contend, that this provision of the KMI was in conflict with the contract between the parties. It takes the position that Respondent effected a unilateral change which was negotiable under Article III, Section 7 of the contract; that this was a matter of local discretion

4/ All dates hereinafter mentioned are in 1971 unless otherwise indicated.

5 / AFGE Exhibits 39B and 39C.

which resulted in changing the obligations and responsibilities of employees set forth in Article XVI of the agreement. Further, Respondent was required to follow the procedure delineated in Article XLII, Section 4 thereof, in order to modify or amend the agreement. The Union insists that by failing to do so and not negotiating under the contract as prescribed -- whether the provision in KMI is a change in the contract or the imposition of a new obligation -- Respondent has violated Section 19(a)(6) of the Order.

Respondent contends it has not changed the agreement by this new KMI provision; that the requirement of a medical clearance is not for the purpose of justifying sick leave, but to establish whether an employee is still ill or unable to attend to particular work assignments. It avers the provision is not in conflict with the contract; that Respondent is only obliged to "consult" with the Union in respect to the medical clearance, and this obligation it has fulfilled. Respondent also insists the Assistant Secretary has no jurisdiction since the dispute is allegedly one of contract application or interpretation under Section 13 of the Order.

B. Issues

Apart from the procedural and collateral matters raised by either party herein, the essential issues are as follows:

1. Is the dispute between the parties -- over whether the revision of KMI requiring a medical clearance is negotiable -- a dispute concerning the interpretation or application of the contract which should be handled under its grievance procedure?

2. If not, was Respondent obligated to negotiate the revision with the Union under the terms of the contract, or was it merely required to consult with the Union regarding same?

3. If Respondent's obligation was limited to consultation, did Respondent consult with the Union within the meaning of Section 19(a)(6) of the Order?

C. Applicable Contract Provisions

In addition to the Article of the agreement hereinabovementioned, there are other applicable provisions of the agreement which bear consideration herein. In the interest of brevity, the undersigned will set forth only the pertinent language of some sections of the contract.

ARTICLE III

OBLIGATIONS OF EMPLOYER

Section 1. The Employer is obligated to consult with the Union concerning personnel policies, the personnel implications of certain management decisions, and on matters directly affecting working conditions. . . .

* * * * *

Section 7. The Employer agrees that personnel policies which are within local discretionary authority will not be changed or implemented without prior negotiations with the Union when they are in conflict with this Agreement.

ARTICLE V

UNION RIGHTS

* * * * *

Section 7. It is the right of the Union to negotiate with the Employer on matters of local discretion which may amend the provisions of this Agreement and to present its views to the Employer at any time on any matter. . . . Formal amendments required to modify the provisions of this Agreement will be processed for approval consideration in the same manner required for approval of this basic Agreement.

* * * * *

ARTICLE IX

CONSULTATION AND NEGOTIATION

Section 1. Consultation and negotiation, for the purposes of this Agreement, shall be defined as follows:

a. Consultation is defined as a conference or discussion between authorized representatives of the Union and the Employer, involving the

exchange of views and recommendations or to keep the Union informed with regard to specific actions contemplated or planned by the Employer. Consultation may take place on any matter of interest to both parties. Consultation will usually be utilized in formulating the general basis for management actions which are within or similar to those matters covered by the broad scope of this Agreement, such as: policies affecting working conditions including. . .safety. . .employees services . . .granting of leave. . .hours of work, shift changes. . .

b. Negotiation is defined as a conference or discussion between authorized representatives of the Union and the Employer wherein oral and written proposals are exchanged and in which written agreement between the parties is the major objective, (e.g., generally the same matters which are subject to consultation, this Agreement, renegotiation of this Agreement upon its expiration, renegotiation of portions of this Agreement to make them consistent with changes in law, rule or regulations, etc.).

* * * * *

ARTICLE XXXVI

GRIEVANCE PROCEDURES 6/

* * * * *

Section 2. The purpose of this Article is to provide a mutually satisfactory method for the settlement of grievances and disputes between employee(s) and the Employer in matters which include

6/ The other sections of this Article set forth a complete formal grievance process with steps to be followed in filing a grievance.

but are not limited to the interpretation and application of this Agreement or any alleged violation thereof, or the interpretation and application of any rule, regulation or personnel practice where the Employer has discretionary authority.

* * * * *

ARTICLE XLII

DURATION OF AGREEMENT

* * * * *

Section 4. This agreement may be reopened for amendment or change at any time by mutual agreement of the parties. However, it is mutually agreed that a bona fide attempt shall be made to hold the number of amendments and changes to a minimum. . . .

D. The Kennedy Management Instructions (KMI)

The Director of the KSC issues KMI which are local regulations or standard operating procedures for the Center. An earlier KMI 1810.1B governed the operation of the medical facility of KSC (giving of Xrays, administering of physical examinations, etc.), but did not provide for a clearance upon returning from sick leave. The clause in controversy, as set forth hereinabove, was a revision to KMI 1810.1B.

Both Eubanks Barnhill, Executive Assistant to the Director of Administration and William J. Holm, Labor-Management Relations Officer for Respondent, testified as to the purport of Article XVI, Section 5 (sick leave clause) and the revision to KMI (medical clearance clause). They testified, and I find, that under Article XVI, Section 5, an employee who is absent on sick leave for more than three days is expected to present a doctor's certificate upon returning to work. The purpose of this requirement is to assure KSC that the employee is entitled to sick leave, and it is an added safeguard that he has not abused his leave privileges. It is merely an approval for sick leave. Further, the KMI revision, which requires medical clearance by the Occupational Health Facility (herein called OHF) if an employee has been on sick leave for five

or more days, deals with the health of the employee upon his return and whether he can perform the same work as previously. It is not an approval for sick leave, but an examination -- physical or otherwise - to ascertain whether the employee, upon his return, is able to perform the same duties. The record further indicates that Respondent considered it important for its own OHF to inspect the employee returning from sick leave since a private physician would not be familiar with the strains or stresses of the particular job performed by the employee.

It is also conceded by Respondent that an employee, under this KMI revision, might be assigned to other duties and responsibilities if it be determined by OHF that he is not able to perform his job after the particular illness. However, Holm avers that in this instance a change of assignment would be temporary. If it became apparent to management that the illness was serious and of a permanent nature, they would invoke the provisions of the Federal Personnel Manual, Chapter 339, which govern the "fitness for duty" physical examinations. This latter procedure is related to retirement disability and a determination must then be made as to whether an employee is suited for the job. This could result in a permanent job change, downgrading, or a separation from Respondent. The revision provides, and the facts show, management did not intend that the medical clearance required under the KMI be a "fitness for duty" physical examination. Rather is the KMI clearance intended to cover a routine absence from work because of illness wherein Respondent is concerned about an employee's readiness to return to his job.

E. Correspondence and Meetings between the Parties

Commencing on January 13 a series of letters was exchanged between the parties regarding the proposed revision to KMI concerning the Medical and Environmental Health Program of KSC. On that date Eubanks Barnhill, as Acting Chief of the Staffs Program Branch, wrote Elmer L. Green, Union President, a letter 7/ asking for his comments re the proposed revision, a copy of which was mailed. His proposal, while not in the language as finally adopted, provided, in essence, that employees who have been on sick leave for more than three workdays may not return to duty until they receive a medical clearance (including such physical examination as is necessary) from OHF.

7/ AFGE Exhibit 2.

A reply letter 8/ from Green to Barnhill dated January 14 stated the proposed revision of KMI is in conflict with the contract and should not be implemented. The Union insisted that management should follow the procedures set forth in the agreement for negotiating amendments or changes (Article XLII, Section 4) if it desired to negotiate the revision.

Under date of January 18, Barnhill sent Green a revised "addendum," which modified the proposed KMI, and the accompanying letter 9/ stated it was done to comply with the Respondent's objection that the KMI revision was in conflict with the agreement. The modification consisted of eliminating the clause requiring an employee who is hospitalized or on extended sick leave to furnish the KSC examining physician a statement from his private physician indicating he has been released to return to duty. Green replied by a letter 10/ dated January 20, in which he commented the revision was still in conflict with the contract and that Respondent should follow the procedures outlined in the agreement to negotiate amendments or changes thereto.

Once again the parties exchanged letters.11/ Respondent's representative wrote on January 22, saying it had reviewed the contract and could find no conflict, but would withhold action until January 27 for the Union to make comments on the proposal. The Union replied on January 25 in a similar vein as its prior responses, and Respondent sent a letter 12/ dated January 27 renewing its declared intention to implement the KMI revision.

A meeting between the parties took place on February 2 in the office of Mr. Hursey, Chief of Personnel of KSC. The Union reiterated its position that the proposed revision was a negotiable item, while management maintained it was only required to consult with the Union. Discussion ensued regarding the entire proposal, and Respondent then agreed to change its time requirement from three to five days before a medical clearance is necessary after sick leave. However, the Union continued to insist that Respondent was in violation of Article III, Section 7 of the contract.

8/ AFGE Exhibit 3.
9/ AFGE Exhibit 4.
10/ AFGE Exhibit 5.
11/ AFGE Exhibits 6 and 7.
12/ AFGE Exhibit 8.

Barnhill wrote a letter 13/ on February 3 to Green reciting that as a result of the meeting the previous day management made two changes in the proposed revision. It added the word "consecutive" and made the time change from three to five days, so that the proposed clause read as follows:

> "NASA employees who have been on sick leave for five or more consecutive workdays may not return to duty until they have received a medical clearance (including such physical examination as is necessary) from the KSC Occupational Health Facility. Where possible arrangements for the clearance should be made by the employee's supervisor through the Personnel Management Assistance Branch, AD-PER-3 in advance of the expected date of return to work."

Green replied by letter 14/ dated February 4 stating that the proposed physical examination is a fitness for duty physical, and an employee should not be required to undergo it except as dictated by the Civil Service Commission. The Union declared therein that employees should have the right to be examined by a licensed physician rather than a KSC contractor physician who may not be licensed in Florida. Further, the Union requested that Respondent submit the matter to NASA Headquarters, and that the revision not be implemented until the Union obtained an opinion from its National Office as to whether the change is in conflict with the agreement.

Upon receiving a letter 15/ dated February 5 from Barnhill that the matters raised by the Union were not germane, and that the Medical Services Office would be asked to include the change in its instruction, Green wrote 16/ Dr. Kurt H. Debus, Director of KSC, requesting him to meet with the Union and discuss the revision.

Another meeting was accordingly held on February 23 at which Union representatives Green and Claude E. Wolfe, First Vice-President, met with Mr. Van Staden, Director of Administration, KSC, as well as other management representatives. The parties repeated their respective positions at this meeting. The Union

13/ AFGE Exhibit 9.
14/ AFGE Exhibit 10.
15/ AFGE Exhibit 11.
16/ AFGE Exhibit 12.

contended the revision would change Article XVI, Section 5, or render it useless since an employee would have new obligations imposed upon him, and it insisted management must negotiate the proposal. Respondent averred there was no change in any contract term, no conflict with the agreement itself, and thus it was only required to consult about the matter.

A further meeting took place on April 20 in an effort to resolve the dispute between the Union and Respondent. Management sought particulars as to how the proposal either conflicted with the agreement or could result in abuse. However, record testimony reflects that the parties once again restated their positions and disagreed as to Respondent's obligation.

Another exchange of letters 17/ between the parties resulted in Respondent adding some new language to the KMI revision which provided (a) it was desirable that medical clearance be obtained by employees on sick leave for more than three consecutive days (the KMI still retained the mandatory clearance for employees on sick leave for five or more consecutive days); (b) the clearance process was not deemed to be a "fitness for duty" determination under the Federal Personnel Manual. Respondent advised the Union that the draft enclosed to the latter was a final one, and KSC intended to proceed with its implementation.

Subsequence correspondence between the parties led to meetings on June 10 and 14 at which discussions took place in an effort to settle the issue. The Union had filed an unfair labor practice charge by letter 18/ dated May 13 sent from Garrison to Debus. In a further effort to resolve the matter, Green sent Respondent the Union's new proposal 19/ on medical clearance policy which made several changes in the proposed KMI, chief of which required a concurrence from an employee's private physician before OHF doctors could recommend that an employee who has been on sick leave not be allowed to perform his duties. Management would not agree to this provision requiring written concurrence from a private physician, and in a letter 20/ dated July 9, William J. Holm,

17/ AFGE Exhibits 14 and 15.
18/ AFGE Exhibit 18.
19/ AFGE Exhibit 25.
20/ AFGE Exhibit 27.

Labor-Management Relations Officer, so advised the Union. He did agree to delete the clause re the desirability of obtaining a medical clearance after three days, as well as to revise the sick leave period requiring medical clearance from five or more to seven or more consecutive workdays. Several other suggested changes were advanced by management.

The foregoing proposals by both the Union and Respondent proved to be abortive insofar as reaching any settlement between them. Despite the fact that it entered into discussions with respect to proposals submitted by both parties, the Union once again retreated to its earlier insistence that the KMI revision be negotiated under the contract in accordance with Article XLII thereof. Further discussion or meetings ceased, and the KMI proposal was put into effect.

CONCLUSIONS

A. Jurisdictional Issue

Section 13(a) of the Order deals with grievance and arbitration procedures and provides in part as follows:

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

Respondent calls attention to the fact that the agreement herein contains a grievance procedure in accord with the quoted section of the Order. Further, it contends the dispute with the Union is a grievance over the interpretation or application of the contract. Specifically, Respondent maintains this case is a grievance over the interpretation or application of the "in conflict" language set forth in Article III, Section 7 of the contract. Therefore, it argues that the matter should be handled under the grievance procedures, and thus under Section 13(a) of the Order the Assistant Secretary has no jurisdiction.

The private sector has dealt with the question of whether an issue was one of contract interpretation. Cases before the National Labor Relations Board (herein called the Board) involving this issue look to the language of the particular clauses in the agreement in determining whether there is really such a dispute. Thus, in United Telephone Co. of the West, 112 NLRB 779, 781 the employer effected a change in overtime and the Union claimed this action violated a clause in the contract requiring that "all rules, schedules, privileges and benefits heretofore in effect which are not specifically mentioned or changed by the provisions contained herein, shall remain unchanged . . . unless changed by mutual consent. . . ." The Board concluded the contract language was not sufficiently clear to avoid a dispute over its terms, and found the disagreement was one of contract interpretation warranting dismissal of the complaint. In other cases where the provisions of the agreement are plain and unambiguous, the Board has rejected the argument that the dispute involved contract interpretation. See Huttig Sash and Door, Inc., 154 NLRB 811, 817. Where the meaning of a clause in the agreement is the subject of controversy the Board will defer to the grievance procedure. Wrought Washer Mfg. Co., 197 NLRB No. 14.

While these principles are not controlling under the Order, they are useful as guidelines in cases involving similar issues. Despite the tendency of the Board to refuse jurisdiction where a contractual dispute exists, it continues to predicate this refusal on a finding that the meaning and application of contract language is the heart of the controversy. I am persuaded that in the "case at bar" the language in the contract adverted to by Respondent is neither ambiguous nor unclear. The term "in conflict" in Article III, Section 7 is not couched in indefinite or uncertain language. It may be true that the very usage of the words requires a resolution of whether changes adopted by the employer are in conflict with the agreement. But the Assistant Secretary should not be disabled from resolving an unfair labor practice issue because it may be necessary to construe a contract. A conclusion as to whether a personnel policy or working condition implemented by Respondent violates the agreement may call for a construction of the provisions thereof. Nevertheless, it does not follow that construing terms of a contract must be undertaken via the grievance procedure.

In the case of Veterans Administration Hospital, Charleston, South Carolina, A/SLMR No. 87, the Respondent similarly moved to dismiss on the ground that the dispute was a contractual one. But the Respondent did not contend the action it took (scheduling nursing service employees) was based on its interpretation of the contract, and there was no reasonable question as to the meaning of the agreement in that regard. The Assistant Secretary denied the motion to dismiss and rejected the contention that the change involved a contractual dispute. In the instant matter, we are not called upon to resolve a question as to the meaning of the "in conflict" phrase. The latter term is not itself the subject of the controversy. We are concerned with whether the KMI revision is in conflict with the agreement. Such concern is not equatable with consideration of the clarity or ambiguity of the words "in conflict." Nor did Respondent base its action upon an interpretation of the agreement. In my opinion, the dispute herein does not involve a matter of contract interpretation based on ambiguous language, and I shall recommend to the Assistant Secretary that Respondent's Motion No. 1 to dismiss the complaint for lack of jurisdiction be denied.

B. Respondent's Obligation to Consult or Negotiate with the Union under the Order

Section 19(a)(6) of the Order provides that agency management shall not refuse to consult, confer, or negotiate with a labor organization as required by the Order. Such a refusal will constitute an unfair labor practice. It becomes apparent, both from the language of the Order and the Study Committee Report and Recommendations thereof, that the obligation to confer or consult differs from the duty to negotiate. The Report and Recommendations of August 1969 set forth national consultation rights, and what they should include, but exclude therefrom the right to negotiate. Moreover, Section 9(b) of the Order deals with national consultation rights, and provides, in substance, that a labor organization (a) shall be notified of proposed changes in personnel policies, and then given an opportunity to comment thereon; (b) may suggest changes in an agency's personnel policies and have its views considered; (c) may confer with officials on personnel policy matters and present its views in writing. Sections 7(d)(3) and (e) of the Order bespeak of consulting as "dealing" and "communicating," whereas

Section 11 refers to the "negotiation" of agreements. Both the Union and Respondent agree that the terms "consult" or "negotiate" are not synonymous. In truth, the distinction drawn under the contract, and the definitions assigned thereunder to both terms, are strikingly similar to those made in the Order. Under Article IX, Section 1, consultation involves an exchange of views and recommendations between the employer and the Union when the former plans some action regarding a matter within the scope of the agreement. Negotiation, under this section, involves an exchange of proposals in which written agreement between the parties is the major objective. Furthermore, Article V, Section 7 declares that the Union has the right to negotiate with the employer on certain amendments which will be processed for approval in the same manner as the agreement itself. Accordingly, the term "negotiate" suggests bargaining between the parties which will result in a written agreement or modification of an existing one.

The Union predicates its contention that Respondent was obliged to negotiate the KMI revision on Article III, Section 7 of the contract. As expressed therein, the employer agreed not to change or implement any personnel policies within local discretionary authority without prior negotiations with the Union when they are in conflict with the agreement. The thrust of the Union's agreement is twofold: (1) that the medical clearance revision is in conflict with the contract, and thus under Article III, Section 7, there is a clear duty to negotiate the revision with the Union; (2) even if the new proposal is not in conflict with the agreement, it imposes additional responsibilities upon the employer pertaining to conditions of employment -- all of which necessitates following the procedures outlined in Article XLII, Section 4 of the agreement governing changes and amendments thereto.

(1) There is little doubt that if the KMI proposal conflicts with Article XVI, Section 5 of the agreement, Respondent is obliged, under this contract clause, to negotiate it with the Union. While it is true that both the KMI revision and Article XVI, Section 5 of the contract both refer to sick leave, each is concerned with different aspects thereof. The contractual provision declares that "absences in excess of three (3) working days must be supported by a doctor's certificate." [Underscoring supplied] The language which follows regarding instances when a doctor's certificate is not needed, and the acceptance of a statement in lieu thereof, are equally referable to requiring confirmation of the fact that an

employee has been absent due to illness. Article XVI, Section 5, as its language states, and as Respondent's witnesses so testified, is concerned with submitting proof in support of sick leave. It was intended as a check on the employees who might otherwise abuse this type of leave. Thus, either a doctor's certificate or, in certain instances, a signed statement by the employer must be submitted in order to earn sick leave when an employee is absent in excess of three days. The KMI revision, on the other hand, requires a medical clearance by OHF after an employee has been on sick leave for five or more consecutive workdays. However, such clearance is not designed to substantiate the fact that an employee was ill for a particular period so as to entitle him to sick leave. The examination by OHF is for the purpose of assuring KSC that an employee is able to attend to his duties. Record testimony reveals that KSC was desirous of knowing whether any special stress or strain endured by an employee could affect his performance of a particular job.

Accordingly, I am persuaded, and conclude, that the KMI revision is not in conflict with Article XVI, Section 5 of the agreement. In my opinion, the former covers a different phase of sick leave than is already provided for in the contract. Requiring a medical clearance imposes a new and different duty upon the employer who is absent on sick leave. It is an added responsibility. One cannot gainsay that it affects the employment condition of employees. Nevertheless, the KMI revision makes no change in existing clauses of the agreement, but rather introduces a new condition of employment. The adoption of the KMI revision and Article XVI, Section 5 does not result in the mutual exclusion of one or the other. They can co-exist side by side. Therefore, I do not believe Respondent was obliged, under Article III, Section 7 of the agreement, to negotiate the KMI proposal with the Union. This particular section requires that no implementation of personnel policies be made without negotiating when the policies are "in conflict" with the agreement, and I find no such conflict to be present.

(2) The Union asserts that assuming arguendo the KMI revision was not in conflict with Article XVI, Section 5 of the contract, it was an adoption of a condition of employment about which Respondent must negotiate. It is urged that whether the KMI be deemed a change or modification, management is required to negotiate when it seeks to impose new responsibilities on employees. In support of this contention, Respondent cite several cases in the

private sector before the National Labor Relations Board which hold that an employer must bargain with a union when it seeks to modify or alter working conditions. The Board has repeatedly found a violation when employers unilaterally instituted changes in terms of employment. Thus, the Union herein maintains the medical clearance was a new or altered condition of employment, concerning which Respondent was required to negotiate. Further, the employer was obliged to follow Article XLII, Section 4 in negotiating any change in the agreement.

It is recognized that an employer has an obligation, in most instances, to negotiate changes in conditions of employment. However, I am constrained to find that the parties herein have set forth in the contract itself definitive obligations of Respondent regarding personnel policies or conditions affecting employment. Thus, Article III, Section 1 states that the employer is "obligated to consult with the Union concerning personnel policies, the personnel implications of certain management decisions, and on matters directly affecting working conditions. . . ." Such contractual language delimits the duty otherwise imposed upon Respondent when it contemplates a change in working conditions or the institution of new personnel policies. It obliges the employer herein to consult in respect to matters affecting working conditions which do not constitute changes in conflict with the agreement under Article III, Section 7. To decide otherwise would be tantamount to rewriting the contract. Further, the limitation imposed upon Respondent's obligation is in no sense repugnant to the Order or illegal per se. 21/ The Union has, in the opinion of the undersigned, waived the right to insist upon negotiating changes in conditions of employment except as set forth in Article III, Section 7. By assenting to the clause in Article III, Section 1, the Union is restricted to consultation vis a vis negotiations rights.

This issue is not without precedent in the Federal sector. In the recent case of U.S. Army School/Training Center, Fort Gordon, Georgia, A/SLMR No. 148, the Respondent therein unilaterally changed meal periods from 30 to 60 minutes. The contract between Respondent and the Union provided that "Any contemplated change in the regularly scheduled workday or workweek shall

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21/ The Union urges that the KMI revision is, in reality, a fitness for duty examination and contrary to Chapter 339 of Federal Personnel Manual, Apart from the fact that the revision provides it is not such an examination, I do not feel it necessary to resolve this contention since any determination does not bear on the unfair labor practice issue.

be in accordance with the applicable rules and regulations and the Lodge (Union) shall be consulted prior to its implementation." [Underscoring supplied] The Union argued that since the 30-minute meal period was specifically expressed in the contract, the employer could not change it without negotiating same with the Union. This was rejected on the ground that the agreement called for consultation by Respondent with the Union as to any contemplated change in the regularly scheduled workday or workweek prior to implementation. Since the Activity had consulted with the Union, the Assistant Secretary found no violation of the Order and dismissed the complaint. In the instant case the contract likewise calls for Respondent to consult on matters directly affecting working conditions. Unless the medical clearance revision runs afoul of the sick leave clauses in the contract -- which would then require negotiation under Article III, Section 7 -- Respondent is merely called upon to consult as to said revision.

C. Respondent's Consultation with the Union

Having concluded that KSC was under a duty to consult, rather than negotiate, with the Union, it must be determined whether consultation took place between the parties. The record reflects that between January and July each party sent approximately eight letters to the other concerning the proposed KMI revision. In January Respondent sought the Union's comments re the proposal, and in mid-January it made a modification which eliminated the necessity for an employee to furnish a statement from his own physician attesting to the fact that the employee is released for return to duty. During this same period of time there were at least five meetings between the parties. At the meeting on February 2, Respondent consented to change the time requirement from three to five days before a medical clearance was necessary after sick leave. Following this meeting, Barnhill wrote Union Representative Green confirming this change and also added the word "consecutive" to the five-day absence clause. At all meetings the Union insisted the proposal conflicted with the agreement and management should negotiate the matter. Respondent inquired as to the manner in which it did conflict, and the Union maintained the revision imposed new responsibilities upon an employee and altered his conditions of employment.

During their discussions, the Union had declared that the medical clearance was, in fact, a fitness-for-duty physical which is regulated by the Civil Service Commission. On April 30 Respondent wrote the Union and, in an effort to overcome this objection, added language to the revision which recited that the clearance was not a fitness-for-duty physical examination. Departing from its refusal to "bzrgain" over the issue, the Union on June 23 sent Barnhill its own proposal for medical clearance which made several changes in the KMI revision, including a requirement that the employee's private physician must concur before the OHF physician could decide that an employee on sick leave was unable to perform his job. While management would not agree to this, it did advance several other suggestions.

It becomes obvious that the foregoing correspondence, meetings, and proposals, constituted consultation of a continuous nature. Not only did KSC seek the Union's suggestions and ideas, it also discussed the revision and its effect upon the employees. Respondent made several changes to meet the Union's concerns, and devoted time to a consideration of the Union's suggestions. Respondent conferred with the Union during a six-month period, exchanged views, and deliberated on the KMI revision. The Union was afforded considerable opportunity to, and did, present its version of the matter. Moreover, it made counter-proposals concerning the revision. While the efforts proved fruitless, I am convinced that Respondent consulted continuously with the Union between January and June. The bargaining which occurred more than satisfied, in my opinion, the obligation to consult. In truth, although there was no negotiation leading to a written agreement on the subject, Respondent in fact "negotiated" the matter with the Union. Accordingly, I conclude that Respondent satisfied its obligation to consult and did not violate Section 19(a)(6) of the Order.

RECOMMENDATION

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

Dated at Washington, D. C.
JUNE 30, 1972

William Naimark
WILLIAM NAIMARK
HEARING EXAMINER

APPENDIX A

Corrections in the Transcript

Page	Line	Appears As	Change To
18	5	However, if this view is determined to be correct	However, if this view is determined not to be correct
33	24	KFC	KSC
42	10	out	ought
46	12	Article 5, Section 16	Article 16, Section 5
59	16	Article 5	Article 16, Section 5
75	3	the Examiner	an example
130	9		delete the work "not"
130	16	FMP	FPM

December 4, 1972

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

UNITED STATES ARMY
SAFEGUARD LOGISTICS COMMAND,
HUNTSVILLE, ALABAMA

UNITED STATES ARMY
SAFEGUARD SYSTEMS COMMAND,
HUNTSVILLE, ALABAMA
A/SLMR No. 224

In this consolidated proceeding the Petitioner, American Federation of Government Employees, Local 1858, AFL-CIO (AFGE) sought elections in separate units of all the professional employees located in the Huntsville, Alabama area of the U.S. Army Safeguard Systems Command (SAFSCOM) and the U.S. Army Safeguard Logistics Command (SAFLOG). The Activities and the AFGE agreed that the units sought were appropriate and they agreed further that employees in certain job classifications were professional employees.

The Assistant Secretary found the claimed units were appropriate, noting that the AFGE already holds exclusive recognition on a separate basis in nonprofessional units in each Activity which are coextensive with the present unit requests and that employees in SAFSCOM and SAFLOG work under separate supervision in Huntsville and under a different chain of command in Washington, D.C. Consistent with the Order, the Assistant Secretary found that the professional employees in each unit were entitled to vote whether they desired separate professional units and, if so, whether they wished to be represented by the AFGE, or whether they wished to be included in the existing certified nonprofessional units in SAFSCOM and SAFLOG.

In addition, the Assistant Secretary found employees in the job classifications of Engineer, Accountant and Auditor, Attorney, Education and Vocational Training Specialist, and Physicist to be professional employees who should be included in the units found appropriate. However, the Assistant Secretary found that the employees in the job classifications of Historian, Librarian and Operations Research Analyst were nonprofessional and that the employees in these classifications should be considered as part of the existing certified nonprofessional units in SAFLOG and SAFSCOM.

A/SLMR No. 224

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES ARMY SAFEGUARD LOGISTICS COMMAND, HUNTSVILLE, ALABAMA

Activity

and

Case No. 40-3673(RO)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1858, AFL-CIO

Petitioner

UNITED STATES ARMY SAFEGUARD SYSTEMS COMMAND, HUNTSVILLE, ALABAMA

Activity

and

Case No. 40-3674(RO)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1858, 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 Renee B. Rux. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 1/

Upon the entire record in this case, the Assistant Secretary finds that:

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

2. In Case No. 40-3673(RO), the Petitioner, American Federation of Government Employees, Local 1858, AFL-CIO, herein called AFGE, seeks an election in a unit of all the professional employees of the U.S. Army Safeguard Logistics Command (SAFLOG) employed in the Huntsville, Alabama area, excluding supervisors and managerial personnel, guards, nonprofessional employees and employees engaged in personnel work except those whose duties are mostly clerical.

In Case No. 40-3674(RO), the AFGE seeks an election in a unit of all professional employees of the U.S. Army Safeguard System Command (SAFSCOM) employed in the Huntsville, Alabama area, excluding management officials, nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and guards and supervisors as defined in the Order.

The Activities and the AFGE agree that the petition in Case No. 40-3674(RO) includes the following professional job classifications: Engineer, Physicist, Education and Vocational Training Specialist, Operations Research Analyst, Librarian, Historian, Attorney, Accountant, and Auditor. In Case No. 40-3673(RO), the parties would include as professionals employees classified as: Engineer, Accountant, Auditor, and Operations Research Analyst.

There are several military activities in the Huntsville, Alabama area which have missile development functions. Most of these activities (none of which have a command relationship with one another) are located at the Redstone Arsenal project area in Huntsville, including the largest activity, U.S. Army Missile Command (MICOM). However, SAFSCOM, SAFLOG, the Advanced Ballistic Missile Defense Agency (ABMDA) and the Corps of Engineers are located at Research Park in Huntsville. Based on separate cross-service agreements signed by the Commanding General of MICOM with each of the commanding officers of 12 separate Army commands, including SAFSCOM and SAFLOG, the civilian personnel office of MICOM renders centralized personnel services for these activities to avoid duplication of functions. 2/ In performing its duties, the civilian personnel office is under the direction of the particular command for which it is performing the function involved.

1/ The parties were in agreement as to the appropriateness of the units claimed in the subject cases as well as to the categories of employees to be included in such units. At the hearing, the Petitioner introduced a Memorandum of Understanding, signed by the parties, agreeing that certain categories of employees were professional employees and moved that the hearing be closed. The Hearing Officer denied the motion. For the reasons enunciated in Army and Air Force Exchange Service, White Sands Missile Range Exchange, White Sands Missile Range, New Mexico, A/SLMR No. 25, I reject the contention I am necessarily bound by the parties' agreement on the appropriateness of the unit and by their agreement on unit inclusions or exclusions. Accordingly, the Hearing Officer's ruling is hereby affirmed.

2/ The other activities covered are the ABMDA, Lance Project Office, SAM-D Project Office, Volunteer Army Ammo Plant, Army Missile and Munitions Center School, RSA Medical Department Activity, Army Combat Developments Command, and Army Strategic Communications Command.

The record reveals that on November 4, 1970, the AFGE was certified as the exclusive representative for all nonprofessional employees of SAFSCOM in the Huntsville area, and that on the same date it was certified as the exclusive representative for a separate unit of all nonprofessional employees of SAFLOG in the Huntsville area.

SAFSCOM is engaged in the development, acquisition and installation of the approved Safeguard Ballistic Missile Defense System and the establishment of a Site Defense Prototype Demonstration Program. There are 21 directorates and office staffs in the SAFSCOM command, all reporting directly to the Commanding General's office in Huntsville. The overall direction of the program comes from the Systems Command Manager located in Washington, D.C. The chain of command beyond the Systems Command Manager runs to the Army Chief of Staff. SAFSCOM employs about 1200 individuals at its facility at Research Park, Huntsville, Alabama, including approximately 354 engineers, 6 education and vocational training specialists, 5 attorneys, an operations research analyst, a historian, a librarian and a physicist. 3/

SAFLOG is assigned the mission of providing logistic support to tactical Safeguard sites and is charged with developing the logistics system for support of the deployed Safeguard system. It is comprised of seven directorates, which report directly to the SAFLOG Commander in Huntsville. While located at the same facility as SAFSCOM, SAFLOG is a subcommand of the U.S. Army Material Command and has no direct command relationship with SAFSCOM. SAFLOG employs approximately 450 individuals including 30 engineers, 5 operations research analysts, 3 accountants and an auditor.

Under all the circumstances, I find that the units sought by the AFGE in the subject cases are appropriate for the purpose of exclusive recognition. In this connection, as noted above, the evidence establishes that the AFGE has represented on a separate basis nonprofessional employees in each Activity since November 1970, and that the claimed units of professional employees would be coextensive with the certified nonprofessional units. Moreover, employees of SAFSCOM and SAFLOG work under separate supervision in Huntsville and under a different chain of command in Washington, D.C. Accordingly, I find that the professional employees in each of the two claimed units have a clear and identifiable community of interest, and that such units will promote effective dealings and efficiency of agency operations.

3/ The record reveals that there are a few employees of SAFSCOM who are assigned permanently outside the Huntsville area and who are not included in the currently represented nonprofessional unit. Similarly, the AFGE does not seek to represent SAFSCOM employees assigned outside the Huntsville area who are deemed to be professionals in this proceeding.

Eligibility Issues

As stated above, the parties contend that employees classified as Engineer, Physicist, Accountant, Auditor, Educational and Vocational Training Specialist, Operations Research Analyst, Librarian, Historian and Attorney, employed by SAFSCOM, are professional employees and should be included in the unit found appropriate in Case No. 40-3674(RO) and that those classified as Engineer, Accountant, Auditor and Operations Research Analyst, employed by SAFLOG, should be included as professionals in the unit found appropriate in Case No. 40-3673(RO). 4/

Engineers

The parties stipulated that employees in the engineering position 5/ were professionals. The record reflects these positions are held by individuals: (1) who are engaged in work predominantly intellectual and varied in character, as opposed to routine, mental, manual, mechanical or physical work, and are involved in the consistent exercise of discretion and judgement in the performance of their work; (2) whose work is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and (3) whose selection for such positions require knowledge of advance type in a field of science or learning, customarily acquired by a prolonged course of specialized and intellectual instruction and study in an institution of higher learning as distinguished from a general academic education, or from an apprenticeship or from training in the performance of routine mental, manual or physical processes.

In my opinion, based on the foregoing stipulation of facts, these employees clearly meet the criteria established in Department of Interior, Bureau of Land Management, Riverside District and Land Office, A/SLMR No. 170, for ascertaining whether employees are "professionals" within the meaning of the Order. Accordingly, these employees may be included in the units found appropriate.

Attorneys

The parties stipulated further that SAFSCOM presently employs five individuals in its General Counsel's office in the Attorney classification who are professional employees in that they occupy positions

4/ In connection with these contentions regarding professional status, the Activities followed the Civil Service Classification Standards for hiring. Thus, the positions alleged by the Activities to be professional are considered professional positions by the U.S. Civil Service Commission.

5/ This category encompassed about 354 employees in SAFSCOM in eight engineering classifications, including a physicist, and 30 employees in five engineering categories in SAFLOG.

which require knowledge of an advanced type, are required to be members of the bar in good standing, and their work is predominantly intellectual in character, requiring the consistent exercise of discretion and judgement. Under these circumstances, I shall include these employees in the unit found appropriate in Case No. 40-3674(RO).

Accountants and Auditors

The record reveals that the minimum requirements for hire in the accountant or auditor positions of SAFSCOM and SAFLOG, is a four-year college degree as an accounting major; three years experience, as a substitute for the degree, which provided a knowledge of generally accepted principles, theories and practices of accounting and auditing; a combination of college and practical experience; or being a Certified Public Accountant.

SAFSCOM currently employs: six accountants (two System Accountants and four Staff Accountants) located in the Office of the Comptroller and Director of Programs Office; nine auditors in the Contracts Office; and three auditors in the Inspector General's Office. There are three accountants and one auditor located in the Comptroller's division of SAFLOG.

The record reveals that the Comptroller's office in SAFSCOM is responsible for coordinating, maintaining, interpreting, and implementing all SAFSCOM's financial management systems. The System Accountants, in effect, are responsible for developing the financial reporting systems to be used by each of the Command's directorates and for providing professional accounting advice, assistance and guidance, to SAFSCOM and other Army commands, other activities and agencies, and outside contractors with respect to SAFSCOM's policies, methods and objectives. Within the Comptroller's office is a Financial Management Division which has four branches (Production, Support, Operations, and Research and Development), with each branch having one Staff Accountant who is involved in preparing budgets, monitoring the budget, and rendering financial advice for programs covering their area of responsibility.

The auditors in the Contracts office act as analysts and technical advisors to the Branch Chief. Their major duties involve reviewing contract proposals to determine if they have proper cost and pricing data, auditing proposals, making pricing reports listing costs and profits, and reporting the information to the contract negotiators as well as sometimes actively assisting in the negotiations.

The auditors in the Inspector General's office perform internal reviews of financial operations within SAFSCOM, which include analysis and review of major directorates and staff offices to determine whether they are effectively accomplishing goals and to insure that funds are spent correctly in the most efficient manner within established rules and regulations.

The Comptroller's division of SAFLOG presently employs three accountants and an auditor who provide SAFLOG's commanding officer with evaluations of the effectiveness and efficiency of the internal management, support and financial functions being performed within SAFLOG.

With respect to the accountants and auditors employed by SAFSCOM and SAFLOG, the record reflects that while their work is reviewed by branch chiefs, such reviews are limited, and generally they work under little or no supervision. Further, it is clear that they occupy positions which require knowledge in an advanced field of learning, that their work is predominantly intellectual in character and requires the consistent exercise of independent judgement and discretion. Under these circumstances, I find that they are professional employees within the meaning of the Order and, therefore, should be included in the units found appropriate.

Education and Vocational Training Specialists

The basic qualifications for the Education and Vocational Training Specialist position includes a bachelor's degree and teacher training, or successful performance in the National Teacher Examinations. The record reveals that six employees currently are employed as Education and Vocational Training Specialists in SAFSCOM's Site Activition Directorate-Training Division. These employees are engaged in developing course material, curricula, and equipment training aids and devices, and coordinating this material with other Army systems. The Education and Vocational Training Specialists do not train Army personnel on the use of the equipment but, rather, manage the efforts of outside non-government contractors who are concerned with manufacturing the training material and the actual training of Army personnel. In the performance of their duties, they frequently travel to different contractors in order to prepare the instructors for the actual training or to monitor the training program to assure and maintain the quality of instruction. They are supervised administratively by a branch chief but receive almost no technical supervision. Under all the circumstances and noting the educational background required and the fact that these employees are essentially teachers whose work is predominantly intellectual in character requiring the consistent exercise of independent judgement and discretion, I find that employees classified as Education and Vocational Training Specialists are professionals within the meaning of the order. 6/ Accordingly, they should be included in the unit found appropriate in Case No. 40-3674(RO).

6/ Cf. Department of Interior, Bureau of Indian Affairs, Navajo Area, A/SLMR No. 99, in which employees in the same Civil Service job series were found to be professional employees.

Librarian; Historian; Operations Research Analyst

SAFSCOM employs a Librarian in the Support Operations Office, Logistics and Facilities Division. The minimum requirements for hiring into the Librarian position, which is a GS-7 level, include either the completion of a full year of graduate study in library science; completion of all the requirements for a full year of graduate study, which include at least one year of library experience at GS-5 level; or a combination of study and experience providing a knowledge and understanding of librarianship. The library involved herein is technical in nature, essentially containing regulations, reports, and other data from SAFSCOM, MICOM, Department of the Army and Department of Defense. The materials are catalogued and classified by the incumbent on the basis of a Thesaurus guideline, but special cataloguing-classifying problems are presented to a technical documentary review panel.

For the GS-5 Historian position in SAFSCOM the basic requirements for hiring are a minimum of three years experience in administrative, investigative or technical work in history, political science, international law or international relations or similar fields which require the ability to deal effectively with the individuals or groups of persons; to collect, assemble and analyze pertinent facts; and to prepare clear and concise written reports. As a substitute for the foregoing experience, an individual may be hired if he has four years of study in an accredited college including an average of six semester hours in or directly related to history. The primary function of the Historian is to compile an annual historical summary, about 300 pages in length, encompassing every facet of the progress of the Command, which is docketed in the Office of Military History in Washington. In compiling the material for the summary, the Historian attends monthly review meetings of the various staffs and directorates, uses minutes of meetings and summaries distributed by various directorates, and, on occasion, does library research. Interviews are conducted with chiefs of various sections after the initial draft to check on the accuracy of the report.

The basic qualification for hire at the initial GS-5 level for Operations Research Analyst positions in both SAFSCOM and SAFLOG is that an individual must have at least a bachelor's degree with a course of study that included 24 semester hours of operations research, mathematics, statistics, logic, and subject matter courses which require substantial competence in mathematics or statistics. SAFSCOM currently employs one Operations Research Analyst in the Cost Analysis Division of its Comptroller and Director of Programs Office. His major duty is to analyze the cost of projects, which involves interviews with cost accountants, engineers and contractors, utilizing, among other things, figures obtained from the Bureau of Labor Statistics, other statistical

formulae, figures on wage rates and trends, and the laws of probability. Thereafter, this information is developed into a mathematical formula to project future costs. The four Operations Analysts in SAFLOG are employed in the Planning and Analysis Directorate and are involved with providing scientific, operations research and mathematical assistance. Further, they act as an evaluation group of various projects on behalf of the SAFLOG Commander.

Under all the circumstances, I find that the Librarian, Historian and Operations Research Analysts are not professional employees within the meaning of the Order and, therefore, should not be included in the units found appropriate. 7/ While the Historian and Operation Research Analysts occupy positions requiring the exercise of certain discretion and judgement, the prerequisites for their jobs do not include a prolonged course of specialized intellectual instruction or study. Rather, such employees are required to have a general degree supplemented by a certain specific course or three years of practical experience in the case of the Historian position. While the Librarian's position requires some specialized education, in my opinion, the Librarian in question is not engaged in the consistent exercise of discretion and judgement, nor is the work performed by the incumbent predominantly intellectual and varied in character. In this regard, the evidence establishes the incumbent in this position follows a standard system for cataloguing and classifying and submits difficult cataloguing-classifying problems to a review panel for resolution.

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

Case No. 40-3673(RO)

All professional employees of the U.S. Army Safeguard Logistics Command (SAFLOG) located in the Huntsville, Alabama area, including employees classified as Engineer, Accountant, and Auditor; excluding all nonprofessional employees, employees classified as Operations Research Analysts, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

7/ Because these employees are not eligible to vote in the claimed units of professional employees, they should be considered as part of the existing certified units of all nonprofessional employees of SAFSCOM and SAFLOG in the Huntsville area.

Case No. 40-3674(RO)

All professional employees of the U.S. Army Safeguard Systems Command (SAFSCOM) located in the Huntsville, Alabama area, including employees classified as Engineer, Physicist, Accountant, Auditor, Attorney, and Education and Vocational Training Specialist; excluding nonprofessional employees, employees classified as Librarian, Historian, Operations Research Analyst, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

During the hearing, the AFGE indicated that it desired that the professional employees herein be provided with an option as to whether they would constitute separate professional employee units or be included in the existing certified nonprofessional employee bargaining units in SAFLOG and SAFSCOM. In accordance with the Order and consistent with the Procedural Guide for Conduct of Elections Under Supervision of the Assistant Secretary Pursuant to Executive Order 11491, the ballots of the professional employees in the units found appropriate should present the following preliminary question: Does the employee wish to be added to the represented nonprofessional unit or does the employee wish a separate unit? A vote for inclusion in the represented unit would make a second question as to the employees' desire for representation meaningless, and a separate tally would be unnecessary. If, however, the professional employees vote for a separate unit, votes for or against the labor organization must be tallied to determine majority status.

DIRECTION OF ELECTIONS

Elections by secret ballot shall be conducted among the employees in the units found to be appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the elections, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the units who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the

designated payroll period and who have not been rehired or reinstated before the election date. Those eligible in each unit shall vote (1) whether they desire to be added to the represented nonprofessional unit, and (2) whether or not they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, Local 1858, AFL-CIO.

Dated, Washington, D.C.
December 4, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

December 14, 1972

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

ILLINOIS AIR NATIONAL GUARD,
182ND TACTICAL AIR SUPPORT GROUP
A/SLMR No. 225

On October 29, 1971, the Assistant Secretary issued a Decision and Order in A/SLMR No. 105 dismissing the clarification of unit petition and directing the appropriate Area Administrator to revoke the Certification of Representative issued to the Illinois Air Chapter, Association of Civilian Technicians, Inc. (ACT) based on the view that the ACT had improperly abused the election process by seeking to include in the unit certain individuals who it previously had agreed were supervisors.

On November 17, 1972, the Federal Labor Relations Council found that the basis for the Assistant Secretary's decision to revoke the Certification of Representative was inconsistent with the purposes of the Order and, therefore, it should be set aside.

Pursuant to the Decision on Appeal of the Federal Labor Relations Council, the Assistant Secretary vacated his Order to the appropriate Area Administrator to revoke the ACT's certification and directed the appropriate Area Administrator to reinstate such certification.

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UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ILLINOIS AIR NATIONAL GUARD,
182ND TACTICAL AIR SUPPORT GROUP

Activity

and

Case Nos. 50-4752,
A/SLMR No. 105,
FLRC No. 71A-59

ILLINOIS AIR CHAPTER, ASSOCIATION
OF CIVILIAN TECHNICIANS, INC.

Petitioner

SUPPLEMENTAL DECISION AND ORDER

On October 29, 1971, I issued a Decision and Order in A/SLMR No. 105 dismissing the clarification of unit petition and directing the appropriate Area Administrator to revoke the Certification of Representative issued to the Illinois Air Chapter, Association of Civilian Technicians, Inc., herein called ACT.

On November 17, 1972, the Federal Labor Relations Council issued its Decision on Appeal in the subject case finding, among other things, that in the circumstances the basis for the Assistant Secretary's Decision to revoke the certification of the ACT was inconsistent with the purposes of the Order and, therefore, it should be set aside. In this regard, the Federal Labor Relations Council remanded the case to the Assistant Secretary for appropriate action consistent with its decision.

Pursuant to the Decision on Appeal of the Federal Labor Relations Council, my Order directing the appropriate Area Administrator to revoke the ACT's certification is hereby vacated and the appropriate Area Administrator is directed to reinstate such certification.

Dated, Washington, D. C.
December 14, 1972

W. J. Usery, Jr., Assistant Secretary of
Labor for Labor-Management Relations

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

Illinois Air National Guard,
182nd Tactical Air Support Group

A/SLMR No. 105
FLRC No. 71A-59

and

Illinois Air Chapter, Association
of Civilian Technicians, Inc.

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a decision of the Assistant Secretary which dismissed the unit clarification petition filed by the Illinois Air Chapter, Association of Civilian Technicians, Inc. (herein called the union); and which revoked the union's certification of representative in a bargaining unit composed of the activity's air national guard technicians employed at Peoria, Illinois. A brief statement of the necessary facts is set forth below.

On June 25, 1970, a representation election was conducted among the activity's air national guard technicians. The election was conducted pursuant to a consent agreement entered into by the parties and approved by the Assistant Secretary's area administrator. The tally of ballots issued after the counting of the ballots disclosed that the election results were inconclusive since the votes cast for the union (46) did not constitute the required majority of the total of valid votes cast (82) plus challenged ballots (25).

Subsequently, on July 2, 1970, the union and the activity stipulated, in writing, that 16 of the challenged voters were supervisors within the meaning of the Order. The parties' stipulation resolving the status of 15 of the aforementioned challenged voters stated:

> It is hereby jointly stipulated by the parties concerned that the following named individuals are certified to be supervisors, as defined by Section 2(c), "General Provisions," Executive Order 11491 and therefore excluded from representation by subject labor organization and

> also not eligible to vote in the Instant Certification of Representatives. It is further stipulated as a result of the foregoing, the challenged ballots as cast by the below named individuals should be excluded from the Tally of Ballots 1/

Based upon a revised tally of ballots which reflected these stipulations, the area administrator then determined that the union had received a majority of the valid votes cast and that the remaining unresolved challenged ballots were not determinative. On July 8, 1970, he certified the union as exclusive bargaining representative for the subject bargaining unit.

On September 25, 1970, the activity notified the union, by letter, that it considered 29 named employees to be supervisors within the meaning of the Order and thereby proposed to exclude them from the bargaining unit. This total was comprised of 14 of the 16 persons previously stipulated to be supervisors, 7 of the 9 unresolved challenged voters, and 8 persons whose status previously had not been in issue.

The union thereupon filed the unit clarification petition here involved with the Assistant Secretary, on October 8, 1970, which sought clarification of the status of the 29 persons claimed to be supervisors by the activity. Pursuant to the union's petition, a hearing was conducted by a hearing officer of the Assistant Secretary in which both the activity and the union presented evidence bearing upon the alleged supervisory status of the 29 individuals named in the activity's letter of September 25, 1970.

The Assistant Secretary issued his decision on October 29, 1971, and found that the union had attempted to negate the stipulations by which it had obtained its certification of representative by filing the unit clarification petition. The Assistant Secretary concluded that the union had entered into "sham stipulations" for the sake of expediency and that its conduct constituted flagrant disregard of his established procedure for the resolution of determinative challenged ballots. Upon the foregoing basis, the Assistant Secretary dismissed the unit clarification petition, and, further, ordered that the union's certification of representative be revoked "because of the substantial doubt which has now been cast upon the validity of the prior certification of representative." (The Assistant Secretary made no determination as to the supervisory status of the disputed individuals.)

1/ The parties entered into a separate but similar stipulation with respect to the remaining stipulated supervisor.

The union petitioned the Council for review of the Assistant Secretary's decision. The Council, on June 22, 1972, accepted the petition for review having determined that major policy issues were presented by the Assistant Secretary's decision. A brief was filed timely by the union which has been duly considered. No submission was made by the agency.

Contentions

The union argues that: (1) the filing of its unit clarification petition was proper under the Assistant Secretary's regulations; (2) it did not enter into sham stipulations or attempt to evade prescribed procedures of the Assistant Secretary; (3) the Assistant Secretary failed to note that "the activity was the initiating party in the setting aside of election stipulations"; (4) "The Assistant Secretary made a punitive decision depriving the [union] of exclusive certification . . . without cause, and in doing so deprived the employees of proper coverage of the Order"; and (5) the Assistant Secretary's decision failed to provide a "ruling on the unit appropriateness and therefore did not establish reason for setting aside the results of a secret ballot election as provided for in the Order." The union requests that their certification be returned as of the date of revocation.

Opinion

The issue before the Council is whether, in the circumstances of this case, the purposes and policies of the Order have been effectuated by the Assistant Secretary's dismissal of the union's petition for unit clarification and revocation of its certification of representative. The Assistant Secretary, as detailed above, found that such action was warranted because of the improper conduct and motivation which he imputed to the union.

Although we sustain the Assistant Secretary's dismissal of the unit clarification petition, we disagree, for reasons indicated below, that the revocation of the union's certification of representative was warranted herein upon the grounds cited by the Assistant Secretary.

Section 6 of Executive Order 11491 provides, in pertinent part, that the Assistant Secretary shall - "(1) decide questions as to the appropriate unit for the purpose of exclusive recognition and related issues submitted for his consideration; and (2) supervise elections to determine whether a labor organization is the choice of a majority of the employees in an appropriate unit as their exclusive representative, and certify the results . . . ." The Assistant Secretary must insure that, in the exercise of these responsibilities, the rights guaranteed Federal employees under section 1(a) are preserved.

To assist in the carrying out of his functions under the Order the Assistant Secretary has established by regulation procedures whereby questions as to appropriate unit and related issues can be resolved. This can be done in two ways. Where there is a dispute, the facts are determined through the hearing process with all the safeguards and opportunities for due process that accompany a hearing. The other method is through the use of consensual agreements between the parties. For example, consent election agreements as authorized by those regulations provide a useful and timesaving tool for permitting an election when it does not appear that the parties are in dispute over the appropriate unit and inclusions and exclusions in the unit. Similarly, throughout the processing of a representation petition there are occasions when stipulations are properly used to dispose of undisputed matters.

Regardless of the method used to establish the facts, the Assistant Secretary must insure that the interests of the employees are protected. Certainly since a stipulation replaces full litigation of an issue, the Assistant Secretary must obtain reasonable assurance prior to acceptance that the stipulation accurately represents the facts and does not operate to deny rights guaranteed by the Order.

Further, where doubt concerning the appropriateness of an already accepted stipulation arises, the Assistant Secretary has the authority to vacate his approval of the stipulation so that a new determination can be made on the subject matter.

We view this as no less true even if a certification has already been issued. When the Assistant Secretary has sufficient reason to believe that a stipulation entered into by the parties is contrary to the interest of employees or otherwise inconsistent with the purposes of the Order, he may revoke a certification which was premised on the stipulation.

In the instant case the filing of the clarification petition appears to have raised voter eligibility questions sufficient in number to affect the outcome of the election, notwithstanding the fact that the parties' stipulations purported to resolve the "determinative" challenged ballots. We agree that in such circumstances the Assistant Secretary may, if he should so decide, examine questions of voter eligibility by such means as administrative investigation or formal hearing for the purpose of determining whether the certification should be revoked. However, we view as inconsistent with the purposes of the Order the punitive revocation of the certification solely because a party may have taken some action which casts doubt on the validity of the earlier stipulation.

Accordingly, while we leave to the discretion and judgment of the Assistant Secretary whether he will examine the merits of the challenged ballots and, if so, by what means he will conduct such examination, we overrule the revocation of the certification insofar as such action was taken because the union took actions inconsistent with its prior stipulation.

With respect to the dismissal of the clarification petition, the union does not challenge the authority of the Assistant Secretary to take such action, although it does not agree that it serves the purposes of the Order or of determinative procedure. However, we see nothing arbitrary or capricious or inconsistent with the Order in such an exercise of the Assistant Secretary's discretion.

For the foregoing reasons, and pursuant to § 2411.17 of the Council's rules of procedure, we sustain the Assistant Secretary's dismissal of the unit clarification petition. We further find that the basis for the decision of the Assistant Secretary to revoke the union's certification of representative is inconsistent with the purposes of the Order, and, therefore, it is set aside. The case is accordingly remanded to the Assistant Secretary for appropriate action consistent with this decision of the Council.

By the Council.

W. W. Gill
Executive Director

Issued: November 17, 1972.

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

UNITED STATES AIR FORCE,
NON-APPROPRIATED FUND ACTIVITIES,
TYNDALL AIR FORCE BASE, FLORIDA
A/SLMR No. 226

This case involves a petition filed by the American Federation of Government Employees, AFL-CIO, Local 3240, (AFGE), seeking a unit of all regular full-time and regular part-time employees of the Non-Appropriated Fund (NAF) Activities at Tyndall Air Force Base, Florida. The AFGE contended, contrary to both the Activity and the Intervenor, National Federation of Federal Employees, Local 1113 (NFFE), that five employees designated as "unit supervisors" and certain intermittent employees, including 12 employees whose employment status had been recently changed to intermittent, should be included in the unit found appropriate.

In finding that the claimed unit was appropriate for the purpose of exclusive recognition, the Assistant Secretary noted that all the Activity's employees are engaged in a common overall mission; work under common supervision; are subject to uniform promotion procedures, grievance procedures, sick and annual leave, pay scales, working conditions, requirements for promotion, and job performance requirements; the majority of the employees have similar job functions; and the claimed unit encompasses all the Activities comprising the NAF at Tyndall Air Force Base.

The Assistant Secretary found that the five employees in the Janitorial and Grounds Branch of the Billeting Fund, who the Activity designated as "unit supervisors," were not supervisors within the meaning of Section 2(c) of the Order. He noted that the record reflected that these employees did not possess the effective authority to hire, suspend, lay-off, recall, promote, reward, or discharge other employees; that they spent a substantial portion of the day performing duties identical to other unit employees; and that their authority with respect to assigning and directing other unit employees was of a routine or clerical nature not requiring the use of independent judgment.

The Assistant Secretary concluded the 12 maids now employed as intermittent employees in the Billeting Fund should be included in the unit found appropriate as these employees continue to work on a regular basis and under the same conditions as when they were classified as regular part-time employees and as they have a reasonable expectancy of continued employment. The Assistant Secretary also included in the

unit 55 other intermittents of the Activity (many of whom were classified as casual or on-call) because the record reflected they work on a regular basis and perform the same work as regular part-time employees; have the same working conditions and pay scales as regular employees; in most instances, they share common supervision with regular employees; and a majority of these employees work substantial periods of the time during the year and have a reasonable expectation of future employment. The Assistant Secretary determined that the record did not support the Activity's designation of the Central Storeroom Manager, the janitor leader in the Non-Commissioned Officer's Mess, the employee in charge of the Maintenance and Supply Section in the Billeting Fund, and the Assistant Manager and night managers of the Bowling Alley as supervisors and/or management officials.

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

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES AIR FORCE,
NON-APPROPRIATED FUND ACTIVITIES,
TYNDALL AIR FORCE BASE, FLORIDA

Activity

and

Case No. 42-1900 (RO 25)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3240

Petitioner

and

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1113

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 Hazel M. Ellison. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including briefs filed by the Activity and the Petitioner, American Federation of Government Employees, AFL-CIO, Local 3240, herein called AFGE, 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 of all regular full-time and regular part-time employees employed by the Non-Appropriated Fund (NAF) Activities, Tyndall Air Force Base, Florida, excluding professional employees, employees classified as temporary, on-call, casual or intermittent, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors and guards as defined by the Order. The AFGE contended that certain maids employed

by the Billeting Fund classified as intermittent, who previously were classified as regular part-time, should be included in any unit found appropriate, and that certain other employees were not supervisors as designated by the Activity.

The Activity did not contest the appropriateness of the claimed unit but asserted that all intermittent employees should be excluded from the unit because they do not share a clear and identifiable community of interest with other employees. It contended also that certain employees it has designated as supervisors are, in fact, supervisors within the meaning of the Order.

The Intervenor, National Federation of Federal Employees, Local 1113, herein called NFFE, took no position regarding the appropriateness of the claimed unit, but agreed with the Activity's contentions with respect to intermittent employees and designated supervisors. Furthermore, the NFFE asserted that the AFGE's petition was invalid because it named as President of the AFGE an alleged supervisor and, in this regard, all correspondence prior to the hearing was directed to that individual. Further, the NFFE was of the view that dismissal of the AFGE's petition was warranted on the basis that the AFGE failed to serve its petition simultaneously on the NFFE as required by the Assistant Secretary's Regulations. 1/

The NAF at Tyndall Air Force Base consists of ten different Activities all of which contribute to the overall mission of providing facilities which contribute to the morale, welfare, and recreation of the military personnel of the United States Air Force. 2/

The record reveals that each NAF Activity at Tyndall Air Force Base is headed by a Custodian who is appointed by the Base Commander. Each Custodian is responsible on a daily basis for the personnel control and administration of his Activity. All Activities are governed by the Air Force Manual for Non-Appropriated Funds Personnel Administration. There

1/ Under the circumstances, I find that dismissal of the AFGE's petition based on its failure to serve the NFFE simultaneously with such petition is unwarranted. Thus, the record reveals that the NFFE is not currently, and never has been, the exclusive representative of the employees in the claimed unit. Further, there is no evidence that the AFGE was aware of any interest by the NFFE in the claimed employees. As there is no evidence indicating that the NFFE was a known interested party in the petitioned for unit, there was no requirement that it be served with a copy of the petition under the Assistant Secretary's Regulations. Moreover, it should be noted that the NFFE intervened timely and fully participated in this proceeding.

2/ The NAF Activities at Tyndall Air Force Base are the Billeting Fund; the Central Base Fund; the Aero Club; the Central Accounting Office; the Non-Commissioned Officers Open Mess; the Officers Open Mess; the Nursery; the Pre-kindergarten; the Saddle Club; and the Yacht Club. The latter two Activities have no employees on their payrolls.

are uniform personnel policies and procedures, promotion plans, annual and sick leave criteria, a standard wage system, and the same grievance procedures for all the NAF personnel. Further, one of the NAF Activities, the Central Accounting Office, provides centralized bookkeeping and accounting services for the other components of the NAF. The record reveals that of the approximately 240 employees of the NAF most are classified as maids, janitors, waitresses, bartenders, stewards, or cooks; that their job functions are, for the most part, unskilled or semi-skilled; and that they can be interchanged readily with similarly situated employees.

Under all the circumstances, I find that the claimed unit is appropriate for the purpose of exclusive recognition under the Order. Thus, all of the claimed employees are engaged in a common overall mission, work under common overall supervision; and are subject to uniform promotion procedures, grievances procedures, sick and annual leave, pay scales, working conditions, requirements for promotion, and job performance requirements. Further, the record reveals the majority of the NAF employees in the various components of the NAF have similar job functions and that the claimed unit encompasses all the Activities comprising the NAF at Tyndall Air Force Base. 3/ Accordingly, I find the employees in the petitioned for unit share a clear and identifiable community of interest and that such a unit will promote effective dealings and efficiency of agency operations. Therefore, I shall direct an election in the unit sought.

Eligibility Issues

As noted above, the parties disagreed with respect to the eligibility of intermittent employees as well as well as the supervisory status of certain other employees. Also, during the course of the hearing, questions concerning the unit placement of certain other employees were raised.

Billeting Fund "Unit Supervisors"

As indicated above, one of the NAF Activities at Tyndall Air Force Base is the Billeting Fund. The record reveals that the Billeting Fund has four branches, one of which is the Janitorial and Grounds Branch headed by a regular full-time foreman. Under the foreman are five regular part-time employees designated as "unit supervisors," who are responsible for maintaining certain grounds and/or buildings. Each "unit supervisor" is assisted by 6 to 14 regular part-time and intermittent maids and janitors who primarily are engaged in making beds, cleaning up, and minor maintenance work. The buildings are used as both permanent and temporary

3/ Compare United States Air Force, Department of Defense, Non-Appropriated Fund Activities, 4756th Air Base Group, Tyndall Air Force Base, Florida, A/SLMR No. 124.

quarters by bachelor officers, bachelor non-commissioned officers, military personnel attending schools, and various transient military personnel.

The record reveals that the five employees in question spend at least 2 to 3 hours per day, and as many as 5 hours, performing the same work as other unit employees. Further, the record reveals that the work performed by unit employees is routine and standardized and that the employees generally are familiar with their tasks and require minimal direction. 4/

The record reflects also that the authority to hire, suspend, lay-off, recall, promote, reward, or discharge the employees in the Branch rests with the Custodian of the Billeting Fund under NAF regulations; and that while he has delegated some of this authority to the Janitorial and Grounds Branch foreman, there has been no formal delegation, in writing or otherwise, to the "unit supervisors." Moreover, at the time of the hearing in this matter, none of the employees in question have evaluated the performance of any unit employees; and while they may be involved in adjusting minor employee problems, the evidence establishes that formal grievances would be handled by the foreman or the Custodian.

Under all the circumstances, I find that the employees designated as "unit supervisors" in the Janitorial and Ground Branch of the Billeting Fund are not supervisors within the meaning of Section 2(c) of the Order. Thus, as noted above, these employees spend a substantial portion of their day performing duties identical to other unit employees, and their authority with respect to assigning and directing the work of unit employees is of a routine or clerical nature not requiring the use of independent judgment. Furthermore, the "unit supervisors" do not possess effective authority to hire, suspend, lay-off, recall, promote, reward, or discharge other employees. Accordingly, I find that the employees in question should be included in the unit found appropriate. 5/

4/ For example, maids have a regularly assigned building to which they report each morning. When a new maid is hired she is assigned to one of the more experienced maids to learn the job, rather than being trained by her "unit supervisor." The record reveals that, in most instances, the only regular contact the "unit supervisor" has with unit employees is when the former is working with them.

5/ In view of my finding that "unit supervisors" are not supervisors within the meaning of the Order, further consideration of the question raised by the NFFE concerning the official status of one of these employees in the AFGE was deemed unwarranted.

Intermittent Employees

The NAF Activities at Tyndall Air Force Base employ some 67 employees designated as intermittent. Among the intermittent employees are 12 maids employed by the Billeting Fund whose employment status was changed in March 1972, from that of regular part-time employees to that of intermittent employees. 6/ The record discloses that while their employee status was changed to intermittent their working conditions have not changed significantly from when they were employed as regular part-time employees. Thus, these employees still report to work on a daily basis and work alongside the maids who retained their regular part-time status; they work the same number of hours as prior to the change in their job status; their pay has remained the same (although some fringe benefits they received formerly as regular part-time employees have been changed); and they remain under the same supervision and share a common mission with regular part-time and full-time employees. 7/

In my view, the record in the instant case reflects clearly that the 12 maids employed by the Billeting Fund, who now are classified as intermittents, should be included in the unit found appropriate as they share a clear and identifiable community of interest with other employees in the unit found appropriate. Thus, despite the change in their job classifications, these employees continue to work on a regular basis for the same periods of time, under the same conditions, and with essentially the same benefits, as when they were classified as regular part-time employees. Furthermore, the record shows that they have a reasonable expectancy of continued employment. Accordingly, the maids classified as "intermittent" employees of the Billeting Fund should be included in the unit found appropriate. 8/

Moreover, the record reveals that the remaining 55 intermittent employees of the NAF Activities (many of whom are classified as casual or on-call) also work on a regular basis and perform the same work as regular full-time and regular part-time employees; that they have the same working conditions and pay scales as regular employees; that, in most instances,

6/ Under NAF regulations, regular part-time employees have a regularly assigned tour of 20 or more hours but less than 35 hours per week. Intermittent employees have (1) a regularly assigned tour of less than 20 hours, or (2) no regularly assigned hours of duty and are hired for jobs on a "casual," "as required," or "on-call" basis.

7/ While the Activity contended that when its busy season ends these employees will not work on a regular basis, it acknowledged that there was no forseeable termination date for these employees.

8/ Cf. United States Army Infantry Center, Non-Appropriated Fund Activity Fort Benning, Georgia, A/SLMR No. 188.

they share common supervision with regular employees; and that a majority of these intermittent employees work substantial periods of time during the year and have a reasonable expectation of future employment. Accordingly, I shall include also these intermittent employees in the unit found appropriate.

Other Eligibility Issues

The Activity and the AFGE contend that the Central Storeroom Manager of the Officer's Open Mess is a management official, while the NFFE contends the employee does not influence policy. The record discloses that the employee in this classification orders and dispenses supplies for the Officer's Open Mess, but that such work is dependent on the needs of the Open Mess and is performed strictly in conformity with Air Force regulations. Further, there is no evidence that the employee makes or influences the making of policy. Under these circumstances, I find that the Central Storeroom Manager is not a management official within the meaning of the Order and, therefore, should not be excluded from the unit found appropriate on such a basis. 9/

The Activity and the AFGE assert also, contrary to the NFFE, that the employee occupying the position of janitor leader in the Non-Commissioned Officer's Mess is a supervisor and should be excluded from the unit found appropriate. The record reveals there are three janitors working under the janitor leader. However, the record reveals further that the janitor leader spends the majority of his time performing in various job functions, including the same work performed by the other janitors; that the work performed by the other janitors is routine and standardized and requires little direction from the leader; that the effective authority with respect to hiring, firing, suspending, or promoting the janitors resides in the Custodian of the Non-Commissioned Officer's Mess; that annual leave is granted only if approved by the Custodian; that the rating form filled out by the leader is of a simple check-off type; and that he has never given an unsatisfactory rating. In all the circumstances, I find the janitor leader is, at most, a work leader and is not a "supervisor" within the meaning of Section 2(c) of the Order. Accordingly, I find that he should be included in the unit found appropriate.

The Activity and the AFGE contend that the employee in charge of the Maintenance and Supply Section in the Billeting Fund should be excluded from the unit as a supervisor. The record reveals that while two positions are authorized under the employee in question, only one position has been filled. The NFFE contends that the employee is not a supervisor because

9/ Cf. Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135.

he exercises authority over only one employee. As the employee in charge of the Maintenance and Supply Section in the Billeting Fund exercises authority with respect to only one employee, I find that he is not a supervisor within the meaning of Section 2(c) of the Order. 10/

The Activity contends that the Assistant Manager and the three Night Managers of the Bowling Alley in the Central Base Fund are supervisors and/or managerial employees. The record reveals that the Custodian of the Billeting Fund has delegated to the Manager of the Bowling Alley (who is not a NAF employee) the authority to hire, fire, reprimand, suspend, rate, and promote the employees of the Bowling Alley and there is no evidence this authority has been delegated to the Assistant Manager or the Night Managers by the Manager. Furthermore, the Assistant Manager and the Night Managers (who are off-duty military personnel) spend the majority of their time working at the customer desk, while the Manager has full responsibility for the operation of the Bowling Alley. As there is no evidence that the Assistant Manager or Night Managers exercise supervisory authority over other employees or meet the criteria established for management officials, I find that the Assistant Manager and the three Night Managers of the Bowling Alley should be included in the unit found appropriate.

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

> All regular full-time, regular part-time and intermittent employees (including those classified as casual and on-call), including off-duty military personnel in any of the foregoing categories 11/, employed by the Non-Appropriated Fund Activities, Tyndall Air Force Base, Florida; excluding professional employees, 12/ employees engaged

10/ See United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, A/SLMR No. 120.

11/ Cf. Army and Air Force Exchange Service, Fort Huachuca Exchange Service, Fort Huachuca, Arizona, A/SLMR No. 167.

12/ The parties stipulated, and I find, that three pre-kindergarten teachers are professional employees within the meaning of the Order.

in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors 13/ and guards as defined in the Order. 14/

DIRECTION OF ELECTION 15/

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.

13/ The parties stipulated and the record establishes that the employees who occupy the position of Head Chef in the Officers Open Mess; Golf Course Pro in the Central Base Fund; Head Steward, Hostess, Head Chef, and Annex Steward of the Non-Commissioned Officers Open Mess; and Administrative Assistant, Janitorial and Ground Foreman of the Billeting Fund are supervisors and/or management officials within the meaning of Executive Order 11491, as amended. In addition, the parties stipulated and the record establishes that the employees occupying the position of Janitorial Services Supervisor and Head Steward in the Officers Open Mess; Marina Manager of the Central Base Fund; supervisor in the Nursery; supervisor of Bookkeeping in the Central Base Fund; and Manager of the Aero Club are supervisors and/or management officials. Under these circumstances, I find that employees in the foregoing classifications should be excluded from the unit found appropriate.

14/ While the parties agreed to exclude "temporary" employees from the unit, and defined temporary employees as those limited to a tenure of 90 days, the record reflected that, in fact, no "temporary" employees are working currently at the Activity. In these circumstances, I make no finding with respect to "temporary" employees. See Alaskan Exchange System, Base Exchange, Fort Greely, Alaska, A/SLMR No. 33 and Army and Air Force Exchange Service, Golden Gate Exchange Region, Storage and Distribution Branch, Norton Air Force Base, California, A/SLMR No. 190.

15/ The record in the subject case is unclear as to whether the inclusion of the "unit supervisors" in the Janitorial and Grounds Branch of the Billeting Fund and of intermittent employees in the petitioned for unit renders inadequate the AFGE's showing of interest. Accordingly, before proceeding to an election in the subject case, the appropriate Area Administrator is directed to reevaluate the showing of interest. If he determines that, based on the inclusion of the above-named employees, the AFFE's showing of interest is inadequate, the petition in this case should be dismissed.

Eligible to vote are those in the unit who are 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 military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, AFL-CIO, Local 3240; or by the National Federation of Federal Employees, Local 1113; or by neither.

Dated, Washington, D.C.
December 15, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

December 18, 1972

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

UNITED STATES DEPARTMENT OF
AGRICULTURE, FOREST SERVICE,
FRANCIS MARION AND SUMTER
NATIONAL FORESTS
A/SLMR No. 227

The Petitioner, National Federation of Federal Employees, Local 379, (NFFE) sought an election in a unit composed of all of the Activity's professional and nonprofessional employees. The Activity agreed that the unit was appropriate but contended that certain classifications of employees were professional. The Activity further contended that certain of the employees sought by the NFFE were supervisors, confidential employees, "temporary" employees or "seasonal" employees and guards and should be excluded from the unit.

The Assistant Secretary, noting the agreement of the parties and the fact that units similar in scope have been found appropriate in prior decisions, found that the claimed unit was appropriate for the purpose of exclusive recognition and would promote effective dealings and efficiency of agency operations.

In determining whether or not certain employees in issue (foresters, civil engineer, cadastral surveyor, contract assistant, soil scientist and landscape architect) were professionals, the Assistant Secretary applied the criteria established in Department of Interior, Bureau of Land Management, Riverside District and Land Office, A/SLMR No. 170, for a professional employee. In applying this criteria, the Assistant Secretary determined that employees in the job classifications of forester and civil engineer were professional employees. In making this determination, he noted that the positions required knowledge of an advanced type, respectively in forestry and engineering; that their work is predominately intellectual in character requiring the consistent exercise of discretion and judgment; and thus the results of their work cannot be standardized in relation to a given period of time. He also found that the employees in the job classifications of cadastral surveyor and contract assistant were not professionals based on the fact that employees in these classifications do not require knowledge of an advanced type in a field of science or learning or a prolonged course of specialized intellectual instruction or study. The Assistant Secretary concluded that the record was not adequate to make a determination as to the professional status of the soil scientist and landscape architect. In this connection, he noted that while the record reflected the actual education requirements for these positions it did not reflect adequately the description of work performed, the degree of discretion and judgment needed in its performance or the character of such work.

The Assistant Secretary found that the fire dispatcher, who acts as a supervisor during the seven month fire prevention season, should be excluded from the unit during that portion of the year that he acts as supervisor. He also found with respect to his status during the "off season" that there was insufficient evidence to make a determination. The Assistant Secretary found that the surveying technician was not a supervisor in that he worked as part of a team and that there is no evidence that he exercises aurhority over team members other than that of a routine nature. The Assistant Secretary further concluded that the record was not adequate to make a determination with respect to the supervisory status of the job classifications, forestry technician, engineering equipment operator, and fire control technician.

The Assistant Secretary found that as the primary duties of the criminal investigator were of a law enforcement nature, he was not a guard within the meaning of Section 2(d) of the Order. He also found that the criminal investigator was not a confidential employee. He noted that while the criminal investigator may on occasion have access to certain confidential information, there is no evidence that he is privy to any confidential information with respect to labor relations or that he acts in a confidential capacity to persons who formulate or effectuate management policies in the field of labor relations. He further found that the criminal investigator was not a professional as the position does not require knowledge of an advanced type in a field of science or learning.

The Assistant Secretary found that those district ranger clerks attending staff meetings where public relations, personnel actions, promotions, and disciplinary actions are discussed are confidential employees and should be excluded from the unit. He also concluded

that the record was not adequate to determine whether or not the personnel clerk was engaged in Federal personnel work in other than a purely clerical capacity. The Assistant Secretary further found that employees classified as "temporary" or "seasonal" have a reasonable expectancy of future employment and thus shared a community of interest with other Activity employees and should be included in the unit. Accordingly, the Assistant Secretary directed an election in the unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT
OF AGRICULTURE, FOREST
SERVICE, FRANCIS MARION
AND SUMTER NATIONAL
FORESTS 1/

Activity

and

Case No. 40-3628(RO)

NATIONAL FEDERATION OF
EMPLOYEES, LOCAL 379

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 John L. Bonner. 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, Local 379, herein called NFFE, seeks an election in a unit consisting of all professional and nonprofessional employees of the Supervisor's Office and Ranger Districts of the Francis Marion and Sumter National Forests, South Carolina, excluding all management officials, employees engaged in Federal personnel work other than in a purely clerical capacity,

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

and guards and supervisors as defined in Executive Order 11491, as amended. The Activity agrees that the unit sought is appropriate, but contends that employees employed in the classifications of forester, civil engineer, landscape architect, soil scientist and cadastral surveyor are professional employees. The Activity also raised a question but took no position on the professional status of employees classified as contract assistants and criminal investigators. In addition, the Activity would exclude from the unit as supervisors those employees classified as forestry technician, surveying technician, fire control technician, fire dispatcher, and engineering equipment operator foreman. It also sought to exclude as confidential employees those classified as district ranger clerk, personnel clerk and criminal investigator and to exclude certain employees as "temporary" or "seasonal" if they had worked less than two seasons. Further, it was contended that Activity employees classified as criminal investigator were guards within the meaning of the Order. The NFFE took no position regarding the eligibility of the employees employed in the above-named job classifications.

In all the circumstances, including the agreement of the parties with respect to the scope of the unit sought and the fact that units similar in scope have been found appropriate in prior decisions, 2/ I find that the claimed unit is appropriate for the purpose of exclusive recognition and will promote effective dealings and efficiency of agency operations.

Although the parties were in agreement as to the appropriate unit, as noted above, the Activity raised several eligibility questions.

Foresters

Foresters are responsible for the silvicultural treatment of forest lands 3/ and for the multiple use treatment or multiple use

2/ See United States Department of Agriculture, Black Hills National Forest, A/SLMR No. 58 and U. S. Department of Agriculture, Forest Service, Schenck Civilian Conservation Center, North Carolina, A/SLMR No. 116.

3/ Silviculture is the scientific management of forest lands based upon the needs and the ecological characteristics of the soils involved.

management of other resources. They perform scientific work in the management of each forest resource - timber, water, forage, wildlife, public recreation, soils, minerals, and land - in interrelationship with other forest resources, to meet present and future public needs. The record reveals that such work involves the development, production, conservation, and utilization of the natural resources of the forests; the protection of resources against fire, insects, diseases, floods, erosion, trespass, and other depredations; the preservation of landscape effects; and establishment of proper environmental conditions for wildlife. A forester is required to have a bachelor of science degree in forestry from an accredited forestry school. 4/ The record reveals that a forester's specialized education is utilized on a continuous basis in the performance of his work and is necessary in order to understand the silviculture or the ecological characteristics of the forest, the insects and diseases that are applicable to various and sundry species of trees, and the characteristics of soils upon which the trees grow.

In a recent decision, I defined the specific criteria which I consider necessary to find an employee a professional within the meaning of the Order. I find that based on the record evidence adduced in this case, the employees in question meet the criteria set forth in that definition. 5/ Thus, the evidence herein estab-

4/ Some of the subjects required toward obtaining a degree in forestry are: Introduction of Forestry, Silvics, Dentrology, Physical Geology, Plant Physiology, Forest Entomology, Dendrometry, Forest Economics, Aerial Forest Mapping, Wood Technology, Silviculture, Wildlife Management, Forest Pathology, Forest Products, Logging and Milling, Forest Protection, Management Plans, Forest Regulation, Forest Policy and Administration, and Forest Valuation.

5/ See Department of Interior, Bureau of Land Management, Riverside District and Land Office, A/SLMR No. 170, where I defined a professional employee as follows:

(A) any employee engaged in the performance of work (1) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from knowledge acquired by a general academic education, or from an apprenticeship, or from training in the performance of routine mental, manual, or physical processes; (2) requiring the consistent exercise of discretion and judgment in its performance;

(continued)

lishes that a forester occupies a position which requires knowledge of an advanced type in the field of forestry; his work is predominately intellectual in character, requiring the consistent exercise of discretion and judgment; and the results of his work cannot be standardized in relation to a given period of time. Under these circumstances, I find those employees classified as foresters to be professional employees within the meaning of the Order.

Civil Engineers

Civil engineers are responsible for all construction, maintenance and improvements of the Activity's facilities. Their job functions include, among other things, bridge design and road construction. They are required to have the equivalent of a bachelor of science degree in engineering. The record reveals that without their required specialized educational background in engineering civil engineers would not be capable of performing the above-noted job functions. From the evidence adduced, it was shown that the work performed by these employees is predominately intellectual and varied in character, requires the use of independent judgment, and cannot be standardized in terms of quantity of work produced. In these circumstances, I find that employees in the job classification of civil engineer are professional employees within the meaning of the Order.

Cadastral Surveyor and Contract Assistant

The cadastral surveyor is engaged in surveying for boundary lines, property lines, and construction work at the Activity. He is required to have a full four-year course of study at an accredited college or university leading to a bachelor's or higher degree, including 30 semester hours in any combination of courses in surveying, mathematics,

5/ (3) which is predominately intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work); and (4) which is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; or
(B) Any employee who has completed the courses of specialized intellectual instruction and study described in clause (A) above and is performing related work under the direction or guidance of a professional person to qualify himself to become a professional employee as defined in clause (A) above.

engineering, photogrammetry, land law and physical sciences. His course of study must have included six semester hours in surveying. 6/

The contract assistant assists the supervisory contract spelist in preparing bids to advertise for various jobs contracted out by the Activity. While an employee in this classification assists in the analysis and administration of the Activity's contracts, the employee's primary function is that of procurement and supply, i.e., knowing the sources of supply, knowing where to obtain the needed materials, and maintaining good relationships with the various companies which contract with the Activity.

The record reveals that in the performance of their jobs cadastral surveyors and contract assistants utilize a limited degree of discretion, judgment and specialized knowledge. Further, they are not required to have knowledge of an advanced type in a field of science or learning or a prolonged course of specialized intellectual instruction or study, but rather it appears that, at most, their knowledge is acquired essentially by a general academic education or by a combination of some limited education and experience. In these circumstances, I find that the cadastral surveyor and contract assistant are not professional employees within the meaning of the Order.

Soil Scientist and Landscape Architect

While the record reflects the educational requirements for these job classifications, in my view it does not reflect adequately the actual work performed by employees in these classifications or the degree of discretion and judgment utilized in the performance of their work. In these circumstances, I make no finding with respect to the professional status of the employees in these classifications.

As noted above, the Activity contends that employees in the following classifications are supervisors within the meaning of the Order:

6/ Alternatively, a cadastral surveyor may have 30 semester hours of course work as described above plus experience which, when combined with the specific course work, will total four years of experience and education.

Fire Dispatcher

The record reveals that the Activity's fire dispatcher serves as dispatcher for the Weatherby District of the forests. He initiates action on fire fighting upon receipt of reports from lookouts and other sources and dispatches men, equipment, and supplies as needed. Reporting to the fire dispatcher, approximately seven months out of the year, are two fire prevention technicians and six lookouts. 7/ During this period, the fire dispatcher has the authority to hire and approve leave up to three days. While the fire control crew roster is established in advance, the fire dispatcher has the authority, if he deems necessary, to expand his crew without consulting higher authority. He also has the authority during the seven month period noted above to cancel previously scheduled vacations if he deems that a fire danger is exceedingly great and he determines which seasonal employees will return the following year.

During the "off season," approximately five months out of the year, the fire dispatcher and those employees he directs are integrated into the rest of the district work force. The record reveals that during the "off season" the job functions of these employees are not related to fire control. 8/

I have found previously that a "seasonal supervisor," who spends a portion of the work year as a rank-and-file employee and the remainder of the year as a supervisor, should be included in an employee bargaining unit during the "out of season" period when he is performing rank-and-file duties. Further, I concluded that such an individual should be deemed eligible to vote in an election providing he is not in a supervisory status at the time of the election; however, he would be included in the unit only during the period in which he exercises no supervisory duties. 9/ The evidence establishes that

7/ The two fire prevention technicians and two of the lookouts are classified as permanent employees; the remaining lookouts have various type appointments, e.g., seasonal, etc.

8/ The record indicates that during the five month "off season" the fire dispatcher and employees under his supervision act as crew chiefs or in some other capacity in the forests.

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

during the seven month fire prevention season the fire dispatcher possesses independent and responsible authority to direct other employees, has the power to hire and determines which seasonal employees will be retained the following year. In these circumstances, I find that the fire dispatcher is a supervisor within the meaning of the Order during the seven month fire prevention season and should not be included in the unit during that period. With respect to his supervisory status during the "off season," I find that there is insufficient evidence to make a determination in this regard. Accordingly, I make no finding with respect to the supervisory status of the fire dispatcher during the "off season."

Fire Control Technician

The fire control technician of the Activity serves as dispatcher in the Lone Cane and Edgefield Districts of the forests. The record discloses that this position is in some degree similar to that of the fire dispatcher position in the Weatherby District. The record reveals that the fire control technician directs three lookouts who are classified as seasonal employees, 10/ but does not have authority to grant leave to these employees. 11/ As the record is unclear as to the extent of supervisory authority exercised by the fire control technician, I shall make no finding with respect to the supervisory status of the employee in this classification.

Surveying Technician

The surveying technician is responsible for surveying roads, forest land and the maintenance of property line roads. He directs one employee (a rodman) who is assigned on a permanent, full-time basis, and another employee who is not permanently assigned.

The record reveals that a surveying technician works along with his crew on a daily basis in the field running a "transit." His project assignments and those of his crew are made pursuant to project plans prepared by the forester or ranger. While there is evidence

10/ The record also discloses that during the fire prevention season he directs a crew of three to five temporary employees in recreation clean-up.

11/ The record reveals that the employees under the authority of the fire control technician generally do not accrue leave.

that the surveying technician makes certain recommendations in connection with the evaluation of the performance of the permanent, full-time employee, the evidence did not show that such recommendations are effective within the meaning of Section 2(c) of the Order.

Based on the evidence overall, I find that the surveying technician is not a supervisor within the meaning of the Order. Thus, he and the employees working with him work as a team and there is no evidence that he exercises authority over such employees other than that of a routine nature. Accordingly, I find the surveying technician is not a supervisor and shall include him in the unit found appropriate.

Forestry Technician

Forestry technicians 12/ serve as assistants to the various district rangers and are responsible for administering a program segment or performing work involving the application or modification of established practices, methods, techniques, and procedures for the development, utilization, management, and protection of forest resources. The record is unclear as to the actual job functions and responsibilities of these employees, the number of employees under their authority, and the degree of supervision, if any, exercised. 13/ In these circumstances, I shall make no finding with respect to the supervisory status of employees in the classification of forestry technician.

Engineering and Equipment Operator Foreman

The primary duty of the engineering and equipment operator foreman is the planning and assigning of work involving the maintenance of the road network in the forests. He determines when roads will be graveled or cleaned and when grass will be mowed. In performing his job function, he directs one road grader and two tractor-type mowers. Although he has the authority to assign employees from one detail to another, it is not clear from the record as to whether such assignments

12/ The record indicates that there are seven District Offices within the Activity and that a typical District Office employs approximately five forestry technicians (one of whom is classified as a supervisor).

13/ One employee in this classification testified that he works alongside and performs the same duties as the employees under his supervision, while another indicated that he spent all of his time supervising.

are of a routine nature. The record also is unclear as to whether the engineering and equipment operator foreman effectively recommends employees under his direction for in-grade raises and promotions or whether he exercises any other supervision authority. Under the foregoing circumstances, I shall make no finding with respect to the supervisory status of employees in the classification of engineering and equipment operator foreman.

As noted above, the Activity raised additional eligibility questions pertaining to the following employee classifications:

Criminal Investigator

The Activity would exclude a criminal investigator as a guard. The record reveals that a criminal investigator is charged with the enforcement of the Code of Federal Regulations with respect to the forest. His primary function is to obtain evidence which can be presented in a court of law. The investigations which he conducts involve violations of Federal Regulations committed by local residents or visitors in the national forests. He also determines the liability of railroads with rights of way in the forest when fires occur which are associated with the railroads. Although the criminal investigator has the power to arrest, is armed, and has the power to conduct "stake outs," he has no patrol responsibility and does not issue "tickets."

The evidence discloses that while certain aspects of the duties of a criminal investigator bear some relationship to the definition of "guards" set forth in Section 2(d) of the Order, he is further charged with additional missions and more varied duties of a law enforcement nature, in which he is engaged a majority of the time, which in my view would distinguish such an employee from a "guard." Thus, the record discloses that the primary mission of the criminal investigator is to investigate violations of Federal Regulations and to prepare evidence that can be presented in a court of law. Under these circumstances, I find that the criminal investigator is not a guard within the meaning of Section 2(d) of the Order. 14/

Alternatively, the Activity contends that criminal investigators are either confidential or professional employees. While the record

14/ Cf. Department of Justice, U. S. Marshal's Service, Northern District of Illinois, A/SLMR No. 197.

indicates that a criminal investigator may, on occasion, have access to certain confidential information, there is no evidence that he is privy to any confidential information with respect to labor relations or that he acts in a confidential capacity to persons who formulate or effectuate management policies in the field of labor relations. Accordingly, I find that the criminal investigator is not a confidential employee. 15/ Further, as the position of criminal investigator does not require knowledge of an advanced type in a field of science or learning, I find that an employee in this classification is not a professional within the meaning of the Order.

District Ranger Clerks

The Activity would exclude on a selective basis as confidential employees all district ranger clerks who handle confidential matters.

The Activity acknowledges that not all district ranger clerks handle confidential matters and proposed that where access to confidential information is denied, the district ranger clerk should be included in the unit. The NFFE would include all district ranger clerks in the unit found appropriate because their job descriptions do not indicate that they have access to confidential information.

The typical duties of a district ranger clerk 16/ include typing, filing, acting as a receptionist, and performing other clerical services for the district ranger. Duties performed by selected district ranger clerks considered to be confidential in nature by the Activity include attendance at staff meetings where public relations, personnel actions, promotions, and disciplinary actions are discussed. Further, it appears that in some instances the district ranger clerk has access to reorganization plans and budgetary matters and subcontracting plans.

Based on the foregoing evidence, I find that those district ranger clerks who attend supervisory staff meetings where public relations, personnel actions, promotions, and disciplinary actions are discussed

15/ Cf. Virginia National Guard Headquarters, 4th Battalion, 111th Artillery, A/SLMR No. 69.

16/ The typical district office has one district ranger clerk; however, the record indicates there are instances where there are two district ranger clerks in a district office.

are confidential employees within the meaning of the Order and should be excluded from the unit. 17/

Personnel Clerk

The personnel clerk works in the supervisor's office and serves principally as to the assistant to the personnel specialist. The Activity contends she is engaged in Federal personnel work in other than a purely clerical capacity. The NFFE took no position with regard to this employee classification. The record reveals that an employee in this classification is responsible for setting up personnel folders and development folders for each employee and processing personnel actions and forms related thereto. The personnel clerk also is responsible for initiating performance ratings and assuring their accuracy and typing correspondence related to personnel actions. Further, this employee is required to provide new employees with information concerning health benefits and life insurance. In the event of an employee grievance, the personnel clerk types the letters relating to the grievance and files related correspondence. Although the record disclosed that the personnel clerk verifies whether or not job applicants for "temporary" positions at the Activity meet certain minimum agency qualifications for employment, it is unclear from the record whether such verifications are of a routine nature. Further, the record is unclear as to whether the responsibilities she assumes in the absence of the personnel specialist involve Federal personnel work in other than a purely clerical capacity. In the circumstances, and noting that the record does not contain sufficient evidence on which to determine whether or not the personnel clerk is engaged in "a purely clerical capacity," I shall make no finding with respect to whether this employee should be excluded from the unit.

Seasonal Employees

The Activity took the position that employees classified as "temporary" or "seasonal" should be excluded from the claimed unit unless they have worked during two or more seasons. The record dis-

17/ Cf. Virginia National Guard Headquarters, 4th Battalion, 111th Artillery, cited above.

closes that approximately one-half of the total work force at the District level are classified as "temporary" or "seasonal" employees. It appears that all of these employees have either 180-day or 220-day appointments. The record reveals that from 50 percent to 60 percent of these employees will be reappointed the following season. The evidence does not indicate that these employees receive separate supervision, nor does it show that they perform duties or are subject to working conditions which are different from those of the permanent employees of the forests. For the reasons stated in U. S. Department of Agriculture, Forests Services, Santa Fe National Forest, Santa Fe, New Mexico, A/SLMR No. 88, and noting particularly the length of their appointments and the fact that a majority of these employees will be reappointed the following season, I find that the "temporary" or "seasonal" employees herein have a reasonable expectancy of future employment and, thus, manifest a substantial and continuing interest in the terms and conditions of employment along with permanent employees. In these circumstances, I find that employees in these classifications are eligible to be included in the unit. 18/

Based on the foregoing, I find that the following employees may 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 Supervisor's Office and Ranger Districts of the Francis Marion and Sumter National Forests, excluding all confidential employees, employees engaged in Federal personnel work other than in a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

It is noted that the unit found appropriate includes professional employees. The Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in a unit with employees who are not professionals, unless a majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of the professional employees as to inclusion in a unit with nonprofessional employees must be ascertained. I, therefore,

18/ See U. S. Department of Agriculture, Forest Service, Schenck Civilian Conservation Center, North Carolina, cited above.

shall direct separate elections in the following voting groups:

Voting Group (a): All professional employees assigned to the Supervisor's Office and Ranger Districts of the Francis Marion and Sumter National Forests, excluding nonprofessionals employees, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

Voting Group (b): All employees assigned to the Supervisor's Office and Ranger Districts of the Francis Marion and Sumter National Forests, excluding professional employees, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

The employees in the nonprofessional voting group (b) will be polled whether or not they desire to be represented by the National Federation of Federal Employees, Local 379.

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, Local 379. 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 appropriate Area Administrator indicating whether or not the National Federation of Federal Employees, Local 379, was elected by the professional employee unit.

The unit determination in the subject case is based, in part, then, upon 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

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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 Supervisor's Office and Ranger Districts of the Francis Marion and Sumter National Forests, excluding all confidential employees, employees engaged in Federal personnel work other than in a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

2. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find that the following two groups of employees will constitute separate units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

> (a) All professional employees assigned to the Supervisor's Office and Ranger Districts of the Francis Marion and Sumter National Forests, excluding nonprofessional employees, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.
>
> (b) All employees assigned to the Supervisor's Office and Ranger Districts of the Francis Marion and Sumter National Forests, excluding professional employees, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area

Administrator shall supervise the election subject to the Assistant Secretary's Regulations. Eligible to vote are those in the 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 by the National Federation of Federal Employees, Local 379.

Dated, Washington, D. C.
December 18, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

December 18, 1972

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

SAVANNA ARMY DEPOT, SAVANNA, ILLINOIS
AND
AMC AMMUNITION CENTER, SAVANNA, ILLINOIS
A/SLMR No. 228

The subject cases involved representation petitions filed by Government Employees Assistance Council, Incorporated, also known as Government Employees Assistance Council (GEAC). In one petition, GEAC sought a unit of all General Schedule (GS) and Wage Board (WB) employees of the Savanna Army Depot (Depot); in a second petition, it sought a unit of all GS and WB employees of the AMC Ammunition Center (Center). Local R7-36, National Association of Government Employees (NAGE) which is the exclusively recognized representative of certain units at the Savanna Army Depot, intervened in the proceedings.

The Assistant Secretary found that the GEAC petition of February 1972, for employees of the Depot was barred by a negotiated agreement signed by the Depot and the NAGE, Local R7-36, on September 7, 1971. The negotiated agreement had been approved by the local base commander and forwarded to higher headquarters for review, but was subsequently recalled by the president of NAGE, Local R7-36, for the "sole reason" of conforming it to the requirements of the recently amended Executive Order 11491. In concluding that the petition was barred, the Assistant Secretary took note of the Study Committee's Report and Recommendations, and Section 15 of the Order which state, in effect, that approval of agreements by higher management levels shall be limited to their conformity with laws and regulations. Thus, at the time the agreement was executed on September 7, 1971, it constituted a bar to the petition filed five months later, and also, the agreement bar continued to exist even after recall of the agreement for the "sole purpose" of conforming it to the requirements of the Order, as amended, as the recall was not for the purpose of rescinding or renegotiating the agreement. Accordingly, he dismissed the petition in this case.

The Assistant Secretary found that there was insufficient evidence received during the hearing upon which a determination could be made on the appropriateness of the unit sought at the Center, or to the extent employees in the Center were covered by the negotiated agreement of September 1971. In reaching his decision, the Assistant Secretary noted that prior to the reorganization of July 1971, which resulted in the establishment of the Center as a separate command entity, the Center was part of the Depot and its mission and functions had been carried out by the Depot, and performed by the same employees who are presently performing these functions. Also, while some limited evidence was presented in regard to employees classified as ammunition surveillance personnel, no evidence was presented as to other employees of the Center, their duties, jobs or classifications. Additionally, he noted that the evidence was insufficient as to the status of other tenants of the Activity, as well as any possible community of interest among any or all of the employees involved.

Accordingly, the Assistant Secretary remanded the petition relating to the Center to the appropriate Regional Administrator for further hearing.

A/SLMR No. 228

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

SAVANNA ARMY DEPOT,
SAVANNA, ILLINOIS

Activity

and Case No. 50-8195

GOVERNMENT EMPLOYEES ASSISTANCE
COUNCIL, INCORPORATED, ALSO KNOWN
AS GOVERNMENT EMPLOYEES ASSISTANCE
COUNCIL 1/

Petitioner

and

LOCAL R7-36, NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES

Intervenor

AMC AMMUNITION CENTER,
SAVANNA, ILLINOIS

Activity

and Case No. 50-8197

GOVERNMENT EMPLOYEES ASSISTANCE
COUNCIL, INCORPORATED, ALSO KNOWN
AS GOVERNMENT EMPLOYEES
ASSISTANCE COUNCIL

Petitioner

and

LOCAL R7-36, NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES

Intervenor

1/ The name of the Petitioner in both of the subject cases appears as corrected at the hearing.

DECISION, ORDER, AND REMAND

Upon petitions duly filed under Section 6 of Executive Order 11491, as amended, a consolidated hearing was held before Hearing Officer Elmer R. Sims. Except as modified herein, the Hearing Officer's rulings made at the hearing are hereby affirmed. 2/

Upon the entire record in these cases,3/ the Assistant Secretary finds:

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

2. In Case No. 50-8195, the Petitioner, Government Employees Assistance Council, Incorporated, also known as Government Employees Assistance Council, herein called GEAC, seeks an election in the following unit:

2/ As discussed below, at the hearing the Hearing Officer made certain rulings, which I find to be in error, with respect to a request for appearance of witnesses and production of documents by a representative of the Intervenor, Local R7-36, National Association of Government Employees, herein called NAGE, and also with respect to the cross-examination of witnesses.

In addition, the Hearing Officer, over objections by the NAGE, attempted to adduce testimony from a witness regarding a pending investigation concerning a labor organization's Standards of Conduct. The hearing in the instant cases was for the purpose of resolving the issues as to the appropriateness of the claimed units and related matters and was not for the purpose of eliciting information relating to a labor organization's Standards of Conduct. Evidence involving Standards of Conduct should not be adduced in a proceeding under Section 202 of the Assistant Secretary's Regulations, but rather, should be obtained in accordance with Section 204 of the Regulations. In this regard, see Report on a Decision of the Assistant Secretary, Report No. 9. In these circumstances, I find that the Hearing Officer erred in seeking to obtain information on alleged violations of the Standards of Conduct in this proceeding, and I have given no consideration to such information as was elicited by the Hearing Officer's examination.

3/ The NAGE filed a Motion for Remand for Further Proceedings. For the reasons stated below, I shall grant the Motion, in part, and remand Case No. 50-8197 for the purpose of obtaining certain additional evidence.

All nonsupervisory wage board (WB) employees of Savanna Army Depot, all nonsupervisory employees in the fire protection and prevention branch, and all nonprofessional and nonsupervisory class act (GS) employees of Savanna Army Depot, excluding all classification act ammunition inspector surveillance personnel and trainees, and all management officials, supervisors, guards, and/or those personnel excluded by Section 10(b), 1, 2, 3, and 4 of Executive Order 11491 as amended by Executive Order 11616. 4/

In Case No. 50-8197, the GEAC seeks an election in the following unit:

All nonsupervisory and nonprofessional class act (GS) and wage grade (WB) employees of the U. S. Army Materiel Command Center, Savanna, Illinois, excluding all ammunition inspector surveillance personnel and trainees, and all management officials, supervisors, guards, and those personnel excluded by Section 10(b), 1, 2, 3, and 4 of Executive Order 11491 as amended by Executive Order 11616.

The GEAC took the alternative position that it would represent employees in any unit found appropriate. The Activity agreed that the units requested by the GEAC were appropriate. The NAGE, while taking the position that there was an agreement bar with respect to the petition in Case No. 50-8195, took no position as to the unit in Case No. 50-8197 based on the view that it was unaware of any interrelation of functions of the employees of the AMC (Army Materiel Command) Ammunition Center, herein called the Center, and Savanna Army Depot, herein called the Depot.

The evidence discloses that the Depot, in addition to its own employees, provides the physical facilities required for its three tenants, the Center, the 259th ORD DET (ED), and the U. S. Army Health Clinic; and certain personnel services for the Center.

The NAGE has been the exclusive bargaining representative for substantially all of the employees of what was, prior to a reorganization, known as the Savanna Army Depot. Thus, in March 1968, the NAGE was granted exclusive recognition in two separate units; all firefighters and all WB employees. In March 1968, it was granted exclusive recognition for a unit of all nonsupervisory employees of the Provost Marshal Division (guards), and in September 1970, it was certified as the exclusive bargaining representative for a unit of all nonsupervisory, nonprofessional GS employees of the Depot. In January 1969, a negotiated agreement with a two-year term was executed covering the firefighters and WB employees. In July 1971, the Headquarters AMC initiated a reorganization which resulted in the establishment of the Center as a separate command entity from the Depot, utilizing employees previously assigned to the Depot. 5/ At the same time, the NAGE was advised by management that the employees of the Center were not in any unit and that all of the ammunition surveillance personnel of the newly formed Center were a part of management. Accordingly, the Depot ceased the dues deductions for those employees assigned to the Center. In August 1971, the NAGE and the Depot negotiated a multi-unit agreement covering the NAGE's four units at the Depot. The agreement was signed on September 7, 1971. As in the previous negotiated agreement, the Activity was identified as Savanna Army Depot.

After being approved by the Depot's Commanding Officer, the negotiated agreement of September 7, 1971, was forwarded on September 13, 1971, to Headquarters AMC for review. The evidence reveals that, thereafter, on October 5, 1971, pursuant to a request by the President of NAGE Local R7-36, Headquarters AMC returned the agreement to the Local. Neither Headquarters AMC nor the Depot was advised as to the reason, if any, for the NAGE's request for recall of the agreement. The evidence establishes that no requests for negotiations were made by either party subsequent to the recall of the negotiated agreement and no negotiation sessions have taken place. Subsequently, on February 17, 1972, the instant petitions were filed.

The Timeliness Question, Case No. 50-8195

The National President of the GEAC, who is also the President of Local #2, GEAC, was the President of the NAGE Local involved herein at the time the agreement was negotiated and executed on September 7, 1971, and also at the time the agreement was recalled. In this proceeding, he testified that subsequent to the signing of the agreement on September 7, 1971, he received copies of the recent amendments to Executive Order 11491 and that because of the changes precipitated by the amendments, it was decided to recall the negotiated agreement in order to conform it to the requirements of the amended Order. He testified further that the recall of the agreement was for the "sole reason" of conforming the agreement to the amended Order.

4/ The unit as petitioned for originally excluded all (both GS and WB) ammunition inspector surveillance personnel and trainees. As amended, the unit would exclude only GS employees in these classifications and would include the WB employees in these classifications in the claimed unit. The Hearing Officer did not rule on the NAGE's request for a recheck of the showing of interest in view of the addition of the WB employees to the requested unit. In view of my disposition of the petition in Case No. 50-8195, I find it unnecessary to rule on the NAGE's request.

5/ Although certain employees of the Depot were assigned to the Center, none of the parties herein contended that the units remaining at the Depot were no longer viable and identifiable.

Section 202.3(c) of the Assistant Secretary's Regulations, which was in effect at the time the negotiated agreement was executed by the Depot and the NAGE, provided, in part, that a petition for exclusive recognition would not be considered timely if filed during the period within which a negotiated agreement was "awaiting approval at a higher management level. . ." In this connection, the Study Committee in its Report and Recommendations indicated that approval or disapproval of a negotiated agreement (at a higher management level) should be based solely upon the agreement's conformity with laws and regulations. Further, Section 15 of the Order provides, in part, that an agreement "shall be approved if it conforms to applicable laws, existing published agency policies and regulations...and regulations of other appropriate authorities." It appears clear from the foregoing that the Order contemplates that review at higher agency levels be circumscribed and limited to whether the negotiated agreement in question conforms to those matters set forth in Section 15 of the Order.6/ Applying this principle to the instant case, at the time the agreement was executed on September 7, 1971, by the Depot and the NAGE at the local level, I find that it constituted a bar to a petition filed approximately five months later for employees in the exclusively recognized units covered by the agreement, even though such agreement was subject to approval at the agency level. I find also that the agreement bar herein continued to exist even after recall for the purpose of conforming the agreement to the requirements of the Order, as amended, so long as the locally approved agreement was not, in effect, rescinded and reopened for the purpose of renegotiations. In the instant situation, when the NAGE Local official asked for the return of the agreement for the "sole reason" of conforming it to the provisions of the amended Order, in my view he was not, in effect, seeking to rescind the agreement and reopen it for renegotiations but rather he merely was seeking to assure that the agreement met all of the requirements of the amended Order.7/ Under these circumstances, I find that the negotiated agreement executed on September 7, 1971, constituted a bar to the petition filed in Case No. 50-8195. 8/

Accordingly, I shall dismiss the petition in Case No. 50-8195.

6/ Cf. Federal Aviation Administration, Jacksonville Air Route Traffic Control Center and Federal Aviation Science and Technological Association, National Association of Government Employees, Local R5-20, A/SLMR No. 194.

7/ Compare U. S. Army Engineer District, Philadelphia, Corps of Engineers, A/SLMR No. 80.

8/ It should be noted also that the record indicates that the NAGE and the Activity considered the September 7, 1971, agreement as operative even after recall by the labor organization. Thus, the record reveals that the Depot continued to deduct dues after the recall of the agreement and attempted to conduct its business in conformity with the provisions of the agreement.

The Unit Question, Case No. 50-8197

As described above, in July 1971, Headquarters AMC established the Center as an entity separate from the Depot. The record reveals that the Center is directed by a civilian who reports directly to Headquarters AMC, as does the Depot base commander. The record appears to indicate that the change amounted to a "paper change" since the missions of the component organizations involved did not change and the duties and functions of the employees involved were unaffected. In this regard, prior to July 1971, the mission of the Center was encompassed within the organizational structure of the Depot. Subsequent to July 1971, it appears that the work of the Center is being performed by the individuals who performed these same functions before the reorganization. Additionally, the Depot personnel office serves employees of both the Depot and the Center, although such services now are paid for by the Center, which is a tenant organization, on a contractual basis. The evidence reveals further that for purposes of reductions in force, the Depot and Center are treated as two separate competitive areas.

The evidence establishes that the Center is composed of five separate organizational entities: ammunition school, civilian career management office, logistics engineering office, advisors office, and program and control office. Although limited testimony was presented as to the ammunition school,9/ no evidence was presented as to the number, classifications, duties, or functions of any of the employees in the remaining divisions or sections of the Center. Further, although there was limited testimony as to the location of the Center employees, transfer and interchange with Depot employees, and possible contact between employees of the two organizations, the record is unclear as to whether all or any of the employees of the Center remain, in fact, within the scope of the existing exclusively recognized units and are, thus, covered by the negotiated agreement between the Depot and the NAGE. 10/ Moreover,

9/ The evidence adduced is unclear because the classifications of Surveillance Inspectors and Surveillance Instructors appear to be used interchangeably in the testimony. Further, it is unclear as to which classifications of employees in the surveillance career field, work in the Depot and which work in the Center.

10/ As indicated above in footnote 2, the Hearing Officer made certain rulings with respect to cross-examination of witnesses. In this regard, during the hearing, the Hearing Officer denied the NAGE representative the opportunity to cross-examine witnesses fully regarding the agreement bar issue posed by the negotiated agreement of September 7, 1971. I find that there is insufficient evidence with respect to the agreement of September 7, 1971 insofar as it may constitute a bar to the petition filed in Case No. 50-8197. Accordingly, I am unable at this time to make any determination in this regard.

if the employees of the Center are not encompassed within the existing recognitions and the negotiated agreement of September 7, 1971, because there is limited record with respect to employees of the Center and a lack of evidence with respect to the other tenants located at the Savanna Army Depot, I am unable to determine whether the employees of the Center share a community of interest separate and distinct from other unrepresented employees located at the Savanna Army Depot (such as those in the tenant organizations). Thus, there is no evidence in the record as to number of classifications of employees of the other tenants, and their relationship, if any, to the employees of the Center.

In sum, the record does not provide, among other things, an adequate basis upon which to determine the appropriateness of the unit being sought in Case No. 50-8197. Accordingly, I shall remand the petition in Case No. 50-8197 to the appropriate Regional Administrator for the purpose of reopening the record in order to secure additional evidence as detailed above. 11/

11/ As indicated in footnote 2 above, the Hearing Office made rulings as to a request for appearance of witnesses and production of documents and the cross-examination of witnesses. The events relating to the cross-examination of witnesses are discussed at footnote 10 above.

As to the request for appearance of witnesses and production of documents, the facts reveal that several days prior to the opening of the hearing, pursuant to instructions from a representative of the Chicago Area Office, counsel for the NAGE submitted a written request for the appearance of witnesses and the production of certain documents to the Chicago Area Administrator, with service on the other parties. Subsequently, in the early stages of the hearing, the Hearing Officer denied the request on the grounds that NAGE had not made a "personal request" to the requested witnesses for their appearance at the hearing. Inasmuch as Section 205.6 of the Assistant Secretary's Regulations, which was in effect at that time (Section 206.7 of the current Regulations is the equivalent of the above Section of the Regulations), did not require any such "personal request" by the parties seeking the appearance of witnesses at a hearing, I find that the Hearing Officer's rulings and statements were in error. In this connection, it is possible that information obtained from those witnesses and documents would have enabled me to make a determination as to either or both, the agreement bar issue and/or the appropriate unit question with respect to the Center. In these circumstances, I shall grant the NAGE's Motion for Remand for Further Proceedings as it relates to Case No. 50-8197.

IT IS HEREBY ORDERED that the petition in Case No. 50-8195 be, and it hereby is, dismissed.

IT IS FURTHER ORDERED that Case No. 50-8197 be, and hereby is, remanded to the appropriate Regional Administrator.

Dated, Washington, D.C.
December 18, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

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

UNITED STATES DEPARTMENT OF COMMERCE,
ECONOMIC DEVELOPMENT ADMINISTRATION,
SOUTHEASTERN REGIONAL OFFICE
A/SLMR No. 229

This case involves a representation petition filed by the National Federation of Federal Employees, Local 1719 (NFFE), for a unit of the Activity's Regional headquarters employees. The Activity is composed of the Regional headquarters located in Atlanta, Georgia, and field offices located in eight surrounding southeastern states. NFFE did not seek to represent the employees located in the field offices.

In all the circumstances, the Assistant Secretary concluded that the petitioned for unit was not appropriate based on the view that the Activity's Regional headquarters employees did not possess a clear and identifiable community of interest separate and apart from other Regional employees. In reaching this determination, the Assistant Secretary relied on the facts that the employees in both the headquarters and field operations of the Activity had the same overall supervision, are engaged in a common overall mission, are subject to the same personnel policies and regulations, performed closely related job functions, and that there had been transfers and interchange of certain employees within the Region. In these circumstances, the Assistant Secretary concluded that establishment of the petitioned for unit would not promote effective dealings and efficiency of agency operations.

In reaching his decision, the Assistant Secretary found that the fact that the NFFE previously represented certain employees who had been covered by a negotiated agreement but who were now part of the petitioned for unit would not bar the petition in this matter which, in his view, covered a newly established employee complement working for a new employing entity.

Accordingly, he ordered that the petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF COMMERCE,
ECONOMIC DEVELOPMENT ADMINISTRATION,
SOUTHEASTERN REGIONAL OFFICE

Activity

and

Case No. 40-4186(RO)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 1719

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 John L. Bonner. 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 parties' briefs, 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 1719, herein called NFFE, seeks an election in a unit of all employees located in the headquarters of the Southeastern Regional Office of the Economic Development Administration, Atlanta, Georgia, excluding those employees in management support positions, supervisors, guards and employees engaged in Federal personnel work in other than a purely clerical capacity.

The Activity contends that the proposed unit, which does not include field office employees of the Southeastern Region, is inappropriate because it would fragment and destroy the closely knit structure of the Region and, consequently, would not promote effective dealings and efficiency of operations.

Background

In January 1972, pursuant to a reorganization, the Activity eliminated two regions headquartered in Huntington, West Virginia (formerly called the Mid-Eastern Region), and Huntsville, Alabama (formerly called the Southeastern Region), and established a new region, called the Southeastern Region, headquartered in Atlanta, Georgia. The record reveals that these actions by the Activity were part of a larger national reorganization about which the employees at Huntington and Huntsville were notified in September 1971.

As a result of the reorganization, the Huntington, West Virginia, Regional Office became a field office of the Atlantic Region, headquartered in Philadelphia, Pennsylvania, and the Huntsville, Alabama, Regional Office was abolished. Of the employees formerly assigned to the Huntington Regional Office, approximately 30 were assigned to the newly established Southeastern Region and the remainder were assigned either to other regions within the Activity or voluntarily terminated their employment with the Activity. Similarly, approximately 53 employees formerly assigned to the Huntsville, Alabama, Regional Office were reassigned to the newly established Southeastern Region and the remaining Huntsville employees were reassigned to other regions of the Activity or voluntarily terminated their employment with the Activity.

Prior to the reorganization, the NFFE was the exclusive representative of the employees located at the Huntington, West Virginia, Regional Office. 1/ It did not, however, represent the field employees of that Office. The NFFE and the Activity executed a negotiated agreement covering the exclusively recognized unit on October 14, 1971. In this connection, the NFFE asserted herein that its prior certification and negotiated agreement covering the Huntington Regional Office employees are still in effect and should be applicable to the employees in the newly established Atlanta Regional Office. 2/ Alternatively, the NFFE took the position that its negotiated agreement with the Activity at Huntington would not constitute a bar to an election in the unit sought in the subject case.

The evidence herein establishes that the Southeastern Region, headquartered in Atlanta, is a new entity comprised of an amalgamation of various employees from at least two former regional offices, including the Huntington Regional Office. Thus, while some of the employees of the newly established Southeastern Regional headquarters in Atlanta were represented previously by the NFFE in the unit at the Huntington Regional Office prior to the reorganization and were covered by a negotiated agreement, the record shows clearly that the new Atlanta facility did not, in effect, constitute a relocation of the Huntington Regional Office. 3/ Under these circumstances, I find that the negotiated agreement between the NFFE and the Activity covering the Huntington employees would not bar the petition in this matter which covers the employees of the Activity's newly established Regional Office in Atlanta, Georgia.

The Unit Question

The Economic Development Administration, herein called the Agency, is headquartered in Washington, D. C., and has six separate regional offices established on a geographical basis, each under a Regional Director. The principal mission of the Agency is to coordinate and direct economic development planning activities relating to redevelopment areas and other areas of substantial need. The Southeastern Region encompasses eight southeastern states and employs approximately 85 employees in Atlanta, Georgia and 11 field offices located throughout the Region. 4/

Located in the Atlanta headquarters of the Region are the following divisions or staffs under the direction and supervision of a Regional Director: Administrative Staff, Equal Opportunity Staff, Special Programs Staff, Regional Counsel, Business Development Division, Public Works Division, Technical Support Division, and Planning Division. In the 11 field offices are economic development representatives, herein called EDR's, civil engineers 5/ and clericals.

The evidence establishes that the Regional Director for the Southeastern Region is responsible for the direction and supervision of all Regional employees. Directly under him are the chiefs of the various staffs and divisions as set forth above. Below the chiefs are various supervisors who report directly to the staff or division chiefs. The Regional headquarters contains the following employee

1/ The American Federation of Government Employees, AFL-CIO, Local 1858, was exclusive representative of the employees at the abolished Huntsville, Alabama, Regional Office.

2/ In view of my determination herein, I find it unnecessary to pass upon the questions whether, under the circumstances, the NFFE waived its negotiated agreement covering the Huntington unit and whether the hearing in this matter should be reopened in order to adduce evidence on the waiver issue, as moved by the NFFE in its brief.

3/ As noted above, many of the Huntington employees were assigned to other regions or voluntarily terminated their employment.

4/ The field offices are located in Hindman, Kentucky; Lexington, Kentucky; Hopkinsville, Kentucky; Nashville, Tennessee; Athens, Georgia; Atlanta, Georgia; Montgomery, Alabama; Jackson, Mississippi; Raleigh, North Carolina; Columbia, South Carolina; and Tallahassee, Florida.

5/ Engineers are located in the Lexington, Kentucky and Jackson, Mississippi field offices. They are responsible directly to the Chief, Technical Support Division in Atlanta.

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classifications: attorney, industrial development officer, field operations officer, manpower development officer, equal opportunity specialist, public works specialist, financial analyst, technical assistant, program specialist, economic development planning specialist, civil engineer, contract administrator, economic development representative, secretary, and clerical.

The record reveals that all employees of the Southeastern Region are subject to common personnel policies and regulations, that all may bid for positions on an Activity-wide basis and that there is no variation in the qualifications for employment or the work to be performed in the respective job classifications throughout the Region. Further, there is evidence of employee transfers between headquarters and the field offices, as well as a close interrelationship between headquarters and field employees. In this latter regard, the record reveals that there are 14 EDR's assigned to the various field offices throughout the Region who report directly to the Regional Director with no intervening supervision. Further, EDR's are in frequent contact with Regional headquarters and are required to attend pre-application conferences in Atlanta with the Regional Director and other staff members for the purpose of reviewing and considering Agency loans. It appears also that the job functions of the field clericals are closely related to the job functions of headquarters' clerical personnel and, in this connection, the record indicates that field clerical personnel have been brought into headquarters to assist on individual projects and to obtain supplies. Moreover, the evidence establishes that civil engineers in the two field offices noted above are under the supervision of the Chief, Technical Support Division at the Atlanta headquarters office and that there is interchange between engineering employees located at headquarters and those in the field as they perform similar job functions.

Under these circumstances, and noting that all of the Regional employees have the same overall supervision, are engaged in a common overall mission, are subject to the same personnel policies and regulations, that there has been transfers and interchange of employees within the Region, and that many Regional and field office employees perform closely related job functions, I find that the employees in the petitioned for unit do not possess a clear and identifiable community of interest separate and apart from Regional employees located in the field offices. Further, in my opinion, the establishment of a unit which includes some, but not all, employees who share a community of interest would not promote effective dealings and

efficiency of agency operations. Accordingly, I shall dismiss the petition herein. 6/

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 40-4186(RO) be, and hereby is, dismissed.

Dated, Washington, D. C.
December 18, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

6/ In view of the disposition herein, I find it unnecessary to decide whether, as contended by the NFFE, the EDR's are management officials and/or supervisors within the meaning of the Order. Nor is it necessary to decide whether certain classifications of employees are professional employees within the meaning of the Order.

Although the NFFE indicated its interest in proceeding to an election in any unit found appropriate, I am advised administratively that its showing of interest is insufficient in view of the inclusion of field office personnel, even assuming that the EDR's were properly excludable from the unit sought.

December 18, 1972

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

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
AIRWAY FACILITIES SECTOR,
FORT WORTH, TEXAS
A/SLMR No. 230

The Petitioner, American Federation of Government Employees, Local Union 2606, AFL-CIO (AFGE) sought an election in a unit of all General Schedule (GS) and Wage Board (WB) employees of the Fort Worth Airway Facilities Sector (AFS, Fort Worth), a part of the national airways system. In addition, the parties would have excluded from the unit certain job classifications on the basis that employees were confidential employees and/or management officials. The parties were in essential agreement on the scope of the unit sought and the eligibility of employees.

The Assistant Secretary found the record was inadequate to make a determination on the appropriateness of the unit sought. In this connection, the Assistant Secretary noted that the record showed that the unit sought is one of 19 Sectors in the Airway Facilities Division of the Southwest Region of the Federal Aviation Administration, and that, although there was some evidence regarding the functions of the employees in the unit sought, the record was unclear and incomplete with respect to authority and ultimate responsibility at various management levels in matters of personnel and labor relations. Moreover, he noted the record lacked information concerning the relationship of the AFS, Fort Worth to other Sectors, the Division, and the Region with respect to such matters as mission, employee job functions, areas of consideration for promotion or reductions in force, and transfer and interchange. The Assistant Secretary noted that on December 7, 1972, he announced a change in policy with respect to representation hearings, in which he indicated the circumstances in which Area and Regional Administrators might properly accept the agreement of the parties on unit and eligibility issues, and/or when hearings should be held; that the parties in the instant case had agreed on the appropriateness of the claimed unit; and that on remand the parties might be able to present evidence to the Area and Regional Administrators indicating the unit was appropriate. Accordingly, he remanded the case to the appropriate Regional Administrator for the purpose of either (1) reopening the hearing to secure additional evidence on the appropriateness of the unit; or (2) on the presentation of sufficient supporting evidence on the agreement of the parties on the claimed unit, having the Area Administrator approve a consent election agreement.

The Assistant Secretary noted also that while the policy statement of December 7, 1972, indicated the Area Administrator, in the absence of significant questions, might approve agreements of the parties on matters of employee eligibility, the instant case arose prior to the change of policy and there was record evidence on certain job classifications on which the parties were in agreement. Accordingly, he made findings on eligibility notwithstanding the agreement of the parties. In this connection,he concluded the secretary to the AFS, Fort Worth Manager, the clerk-stenographers at certain field offices, and the clerical assistant at the Abiline Field Office, were all confidential employees and should be excluded from any unit found appropriate. In addition, the Assistant Secretary found that the engineering technician is a supervisor, and that the Administrative Officer, who the parties alleged to be a management official and/or a confidential employee, was, in fact, an employee engaged in Federal personnel work in other than a purely clerical capacity and should, therefore, be excluded from any unit found appropriate under Section 10(b)(2) of the Order. However, the Assistant Secretary determined that the technicians-in-depth and the supply specialist were not management officials, and should be included in any unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
AIRWAY FACILITIES SECTOR,
FORT WORTH, TEXAS 1/

Activity

and

Case No. 63-3383(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL UNION 2606, AFL-CIO

DECISION AND REMAND

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Royce E. 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 a brief filed by the Activity, the Assistant Secretary finds:

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

2. The Petitioner, American Federation of Government Employees, Local Union 2606, AFL-CIO, herein called AFGE, seeks an election in a unit of all full-time or permanent General Schedule and Wage Board employees of the Fort Worth Airway Facilities Sector, excluding employees classified as Clerk-Stenographer, Secretary to the Airway Facilities Sector Manager, Clerical Assistant, Administrative Officer, Supply Specialist and Technician-In-Depth, management officials, professionals, employees engaged in Federal personnel work in other than a purely clerical capacity, guards and supervisors as defined in the Order.

The Activity and the AFGE were in essential agreement as to the appropriateness of the claimed unit and the proposed exclusions.

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

The Unit

As noted above, the proposed unit would include both General Schedule (GS) and Wage Board (WB) employees of the Airway Facilities Sector, Fort Worth, Texas, hereinafter called AFS, Fort Worth. The AFS, Fort Worth is comprised of several staff groups, located at Meacham Field, Fort Worth, Texas, and several Sector field offices ranging from 20 to 150 miles from Fort Worth. Its mission is to maintain a portion of the national airways system and to manage available resources. While there is some record evidence concerning the job functions of the employees of the AFS, Fort Worth, 2/ the record fails to show in sufficient detail how the AFS, Fort Worth operates in relation to the overall structure of the Federal Aviation Administration. Thus, although the record reflects that there are other Sectors besides the AFS, Fort Worth in the Airway Facilities Division of the Federal Aviation Administration, 3/ it appears that all of the Sectors of the Airway Facilities Division, except for the AFS, Fort Worth, are at one location; that most of the work performed by other Sectors is "inside" work as opposed to the field work performed in the various field offices of the AFS, Fort Worth; that the chain of command for each Sector runs directly to the Airway Facilities Division Chief; and that the AFS, Fort Worth is headed by a Manager and the AFS, Fort Worth field offices are headed by Chiefs who, in addition to being responsible for management or equipment and facilities in their jurisdiction, apparently have some authority with respect to hiring, firing, and other personnel functions, including labor-management relations matters. However, the record is unclear and incomplete with respect to the authority of the AFS, Fort Worth Field Office Chiefs, and to the ultimate responsibility of the AFS, Fort Worth Manager, the Airway Facilities Division Chief, and the Regional Chief in matters of personnel and labor-management relations. Moreover, the record does not contain information with respect to the other Sectors of the Airway Facilities Division with respect to their

2/ The record reveals that supervisory electronic technicians at each field office are responsible for direct supervision of the employees within that office and day-to-day management of the field office. They report to the AFS, Fort Worth headquarters, are in regular telephone contact with headquarters, and attend monthly staff meetings. The AFS, Fort Worth electronic technicians spend much of their time out of the office, although they report in on a daily basis. Further, employees within the AFS, Fort Worth classified as technicians-in-depth regularly visit the field offices, investigate operations, and make recommendations back to headquarters.

3/ The evidence establishes that there are 19 Sectors, including the AFS involved herein, in the Airway Facilities Division of the Southwest Region of the Federal Aviation Administration.

mission; the differences or similarities in their job functions; their relationship to the AFS, Fort Worth and the Airway Facilities Division and the Region; whether there is any overlapping of supervision among the various Sectors of the Division; the areas of consideration for promotion or reductions in force; and whether there has been transfer or interchange among employees of the Sectors, the Division and the Region. Thus, the record fails to reflect whether the claimed employees, in fact, possess a community of interest separate and distinct from other employees of the Division and/or the Southwest Region.

On December 7, 1972, I announced a change in policy with respect to representation hearings. 4/ In the policy statement, I indicated those circumstances under which Area and Regional Administrators may properly accept agreements of the parties on unit and eligibility issues, and/or the circumstances under which hearings should be ordered. I stated, among other things:

> A hearing should be held when the Area or Regional Administrator determines that he has a significant question about the unit or employee eligibility, that the agreement of the parties may be violative of the Order or the policies I have established, or that the parties' agreement raised questions of policy which I have not considered.

Although, in the instant case, the parties agree upon the appropriateness of the claimed unit, I have found, as indicated above, insufficient basis upon which to determine the appropriateness of the unit. However, it is possible that the parties, upon remand of this proceeding, may be able to present to the Area and Regional Administrators evidence on the questions I have raised which will indicate the unit meets established criteria on unit appropriateness. Accordingly, I shall remand the case to the appropriate Regional Administrator, who may either (1) reopen the hearing for the purpose of securing additional evidence on the appropriateness of the unit; or (2) upon the presentation of sufficient supporting evidence establishing that the agreement of the parties on the claimed unit is not violative of the Order or policies of the Assistant Secretary and does not raise a question of policy which has not been considered, have the Area Administrator approve a consent election agreement.

Eligibility Issues

The parties agreed that clerk-stenographers, a clerical assistant, and the Secretary to the Airway Facilities Sector Manager are confidential employees. They agreed also that the Administrative Officer,

4/ See Appendix A, attached.

the Technicians-in-Depth and the Supply Specialist should be excluded from the unit found appropriate as management officials and/or because they are confidential employees. It was asserted that the interests of all of the above employees are more closely aligned with management than with unit employees. In addition, the parties agreed the Engineering Technician on the Environmental Support Staff is a supervisor and should be excluded from the unit.

I have indicated in the policy statement of December 7, 1972, referred to above, that the Area Administrator may, in the absence of significant questions, approve the agreement of the parties with respect to matters of employee eligibility. However, because the instant case arose prior to issuance of my change in policy, and as there is record evidence on these job classifications, I shall, notwithstanding the agreement of the parties, make findings on eligibility in accordance with the evidence adduced.

Secretary to the Airway Facilities Sector Manager

The record reflects that this employee is considered to be the personal secretary of the Airway Facilities Sector Manager. In Virginia National Guard Headquarters, 4th Battalion, 111th Artillery, A/SLMR No. 69, I stated it would effectuate the policies of the Order if employees who assist or act in a confidential capacity to persons who formulate and effectuate management policies in the field of labor relations are excluded from bargaining units. The parties are in agreement that this employee meets the criteria for a confidential employee, and I find the record supports this agreement. Accordingly, I shall exclude this employee classification from any unit found appropriate.

Clerk-Stenographers; Clerical Assistant

The parties agree that the clerk-stenographers who perform clerical, administrative and secretarial duties for Field Office Chiefs, and that the clerical assistant, who performs similar duties for the Manager of the Abilene Field Office, are confidential employees. As in the case of the Secretary to the Airway Facilities Manager, I find that the record supports the agreement of the parties and I shall exclude these employee classifications from any unit found appropriate.

Administrative Officer

The parties would exclude from the unit the Administrative Officer as a management official and/or as a confidential employee. The record reflects that this employee, among other things, is the point of contact for the AFS, Fort Worth Manager and the employees on such matters as promotions, awards, and the processing of disciplinary actions. Further, he provides advice and guidance on personnel matters to the Manager and

to clerical employees in the field offices; is the liaison between the Activity and the Region's Manpower Division; and is in control of promotion lists and certain confidential personnel files. In my view, the foregoing evidence demonstrates that the Administrative Officer is engaged in various aspects of Federal personnel work for the AFS, Fort Worth. Inasmuch as Section 10(b)(2) of the Order specifically excludes such employees from appropriate units, I find that the Administrative Officer should be excluded from any unit found appropriate on the basis that he is engaged in Federal personnel work in other than a purely clerical capacity. 5/

Technicians-In-Depth

The two Technicians-in-depth (TID's) employed by the AFS, Fort Worth are alleged to be management officials. The record reveals that they perform a staff function, visiting the field facilities and dividing their time between the evaluation of operations and the maintenance of equipment. Their evaluation of operations includes tracing the cause of substandard performance, which could include personnel as well as equipment shortcomings. However, the major part of their time is spent evaluating equipment operation as distinquished from personnel performance. The record indicates that such evaluations are performed within established guidelines and that national standards of tolerances, as set forth in handbooks, rather than independent judgment guide the TID's.

Based on the evidence presented, I find the TID's do not meet the criteria for exclusion as management officials set forth in Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135. In that case, I found that a "management official" is an employee having authority to make, or effectively influence the making of, policy with respect to personnel, procedures, or programs. It was noted in that decision that in determining whether an employee was a management official it should be ascertained whether the employee involved was an expert or professional rendering resource information or recommendations, or whether his role extended to the point of active participation in deciding what the policy would be. In the instant case, the TID's function has not been shown to extend beyond the role of a resource person to the point of active participation in deciding policy. Nor was it shown that their interests are more closely aligned with management than with other employees in the unit sought. Under these circumstances, I find that the TID's should be included in any unit found appropriate.

5/ Under these circumstances, I find it unnecessary to pass on whether the Administrative Officer is a managment official and/or a confidential employee.

Supply Specialist

The evidence establishes that the Supply Specialist is responsible for periodic housekeeping and safety inspections, has authority to purchase and dispose of supplies up to a limited dollar-amount, is responsible for independent contracting for maintenance and, in addition to safety inspections, conducts safety meetings and instructs technicians if he observes minor safety violations. Also, it appears that on one occasion the Supply Specialist made a suggestion to higher management which was approved regarding inventory policy.

With the exception of the last item noted above, there is no evidence supporting the conclusion that the Supply Specialist is a management official within the meaning of Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, cited above. Moreover, in my view, the fact that one of his suggestions regarding inventory policy ultimately was adopted by the Activity does not, standing alone, establish that he, in fact, has authority to make or effectively influence the making of policy, or is other than an expert rendering resource information or recommendations with respect to the policy in question. Accordingly, I find that the Supply Specialist should be included in any unit found appropriate.

Engineering Technician

The parties agreed that an Engineering Technician attached to the Environmental Support Staff of the AFS, Fort Worth should be excluded from the unit as a supervisor. The record shows that this employee, in fact, does perform supervisory duties such as assigning work and rating employee performance. As the record supports the parties' agreement that this employee is a supervisor within the meaning of the Executive Order, I find that he should be excluded from any unit found appropriate.

As indicated above, I find the record in this case does not provide an adequate basis on which to determine the appropriateness of the unit sought. Therefore, I shall remand the subject case to the appropriate Regional Administrator for appropriate action as detailed above.

ORDER

IT IS HEREBY ORDERED that the subject case be, and it hereby is, remanded to the appropriate Regional Administrator.

Dated, Washington, D. C.
December 18, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

APPENDIX A

NEWS

U. S. DEPARTMENT OF LABOR

OFFICE OF INFORMATION, WASHINGTON, D. C. 20210

FOR RELEASE: A.M. EDITIONS
Thursday, December 7, 1972

For further information:
C. A. Caldwell 961-5075
Home 356-8282

POLICY CHANGE ANNOUNCED
IN 11491 REPRESENTATION CASES

A change in policy concerning the sending of representation cases to hearing under Executive Order 11491 was announced today by Assistant Secretary of Labor W. J. Usery, Jr.

Usery stated the policy change as follows:

"Heretofore it has been my policy to not approve consent election agreements and to order hearings whenever an Area Administrator questioned the appropriateness of the unit sought or the eligibility of certain employees, either as supervisors, management officials, temporary employees, seasonal employees, probationary employees, off-duty military moonlighters, or as professional employees.

"Further when a hearing was held because of a basic question on one point (for example--appropriate unit), I required a full and complete record on the other facets of the cases, such as employee eligibility and procedural bars, so that my decision would be based on a full and complete factual record. This requirement existed regardless of whether the Area Administrator had any questions on eligibility or procedural bars in the example cited.

"It was my view in that in order to effectuate properly my role under the new labor-management relations program established under E.O. 11491, it was imperative that all parties working under the Order understand clearly the substantive policies which would be applicable.

"At this point in time we have been operating under E.O. 11491 for almost three years. Over 200 formal decisions have been issued. These decisions resolved many basic unit, employee eligibility and procedural bar issues. They provided definitions for professional employees and for management officials as well as policy determinations concerning confidential employees, temporary employees, etc.

"Under these circumstances, it is my belief that the program now has reached the stage that I should change my policies on hearings. Accordingly, I am establishing the following principles to guide Area and Regional Administrators regarding whether or not a hearing should be held and, if so, what its scope should be:

MORE

"1. A hearing should be held when the Area or Regional Administrator determines that he has a significant question about the unit or employee eligibility, that the agreement of the parties may be violative of the Order or the policies I have established, or that the parties' agreement raised questions of policy which I have not considered.

"2. In reaching a decision as to whether an employee eligibility question is significant and therefore requires a hearing, due consideration should be given to the number of persons involved relative to the total number in the unit, the fact that challenged ballot procedures and clarification of unit procedures are available to resolve the issue, and that the delay inherent in solving the problem of a small number of employees automatically denies for an extended period of time a larger number the opportunity to express their wish at the ballot box.

MORE

"3. Whenever a hearing is held it should be confined to the specific issue(s) which is questioned by the Area or Regional Administrator. Thus, if the Area or Regional Administrator has a significant question regarding the unit, but has none on employee eligibility, then the hearing will be confined to the unit matter. My decision in such a situation will deal with the unit question and I shall accept the agreement of the parties with respect to employee eligibility as approved by the Area Administrator.

"These principles will be followed in hearings held after the receipt of this instruction."

#######

December 18, 1972

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

FEDERAL AVIATION ADMINISTRATION,
JACKSONVILLE AIR ROUTE TRAFFIC CONTROL CENTER
A/SLMR No. 231

The subject case involves a representation petition filed by the Professional Air Traffic Controllers Organization, affiliated with Marine Engineers Beneficial Association, AFL-CIO (PATCO), for a unit of air traffic control specialists employed at the Jacksonville Air Route Traffic Control Center. Local R5-20, National Association of Government Employees (NAGE) intervened in the case. The parties entered into a stipulation setting forth all material facts and the case was transferred by the Regional Administrator to the Assistant Secretary for decision.

Three issues were presented for decision: (1) whether the petition was filed timely within the meaning of Section 202.3(f) of the Assistant Secretary's Regulations in view of the fact that it was filed within the twelve (12) month period following the close of the hearing on a petition filed by the PATCO for a nationwide unit of controllers, which included the controllers claimed herein; (2) whether the instant petition, which sought a facility-wide unit, should be dismissed as being an abuse of the administrative process in view of the fact that it was filed at a time when the petition for a nationwide unit of controllers was pending; and (3) whether the appropriate unit should include teletype operators and flight data aides in view of the fact that they are covered by the same negotiated agreement as the controllers.

The Assistant Secretary found that because the employees in the claimed unit could not be included in the nationwide unit sought by the PATCO in its prior petition based on the existence of a procedural bar at the time such petition was filed and, therefore, were barred from participating in a representation election, the unit herein could not be considered to be a "subdivision" of the nationwide unit determined to be appropriate. Rather, he viewed the claimed unit as a separate appropriate unit. The Assistant Secretary indicated that Section 202.3(f) was designed to reach those situations where a petition was dismissed after a unit determination hearing and within 12 months thereafter the same unit or subdivision thereof is petitioned for again. He noted that the PATCO's petition for a nationwide unit had not been dismissed, but rather was modified because of procedural bars. Under the circumstances, the Assistant Secretary found the petition herein was not barred by Section 202.3(f) of the Regulations.

As to the second issue, the Assistant Secretary determined that based on the fact that at the time the PATCO filed its petition for a nationwide unit the subject unit was covered by a negotiated agreement which possibly barred its inclusion in the nationwide unit, the filing of the petition herein did not constitute an abuse of the administrative process. The Assistant Secretary noted that any other course of action by the PATCO could have resulted in precluding it from raising a timely question concerning representation in the instant unit for a substantial period of time. Accordingly, the Assistant Secretary determined that the petition was not invalid.

Regarding the third issue, the Assistant Secretary determined that a unit restricted to the controllers, as requested by the PATCO, was appropriate for the purpose of exclusive recognition under the Order in view of the fact that while the controllers, teletype operators and flight data aides were covered by the same negotiated agreement, the agreement was a multi-unit agreement and the controllers and the teletype operators and flight data aides were represented in two separate units; and the fact that, as found in Federal Aviation Administration, Department of Transportation, A/SLMR No. 173, the controllers had a separate and distinct community of interest from that of the teletype operators and flight data aides.

A/SLMR No. 231

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL AVIATION ADMINISTRATION,
JACKSONVILLE AIR ROUTE TRAFFIC CONTROL CENTER

Activity

and Case No. 42-2109(RO)

PROFESSIONAL AIR TRAFFIC CONTROLLERS
ORGANIZATION, AFFILIATED WITH MARINE
ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO

Petitioner

and

LOCAL R5-20, NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES

Intervenor

DECISION AND DIRECTION OF ELECTION

This matter is before the Assistant Secretary pursuant to Regional Administrator J. Y. Chennault's Consolidated Order Transferring Case to the Assistant Secretary of Labor pursuant to Section 205.5(a) and 205.5(b) of the Assistant Secretary's Regulations.

Upon the entire record in this case, including the parties' stipulation of facts, accompanying exhibits and a brief filed by the Petitioner, Professional Air Traffic Controllers Organization, affiliated with Marine Engineers Beneficial Association, AFL-CIO, herein called PATCO, and the Activity, the Assistant Secretary finds:

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

2. PATCO seeks an election in a unit consisting of all non-supervisory air traffic control specialists, GS-2152 series, regardless of grade, at the Jacksonville Air Route Traffic Control Center, Hilliard, Florida, excluding 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 Order.

The employee classification covered by the instant petition is essentially the same classification as that sought by the PATCO in Federal Aviation Administration, Department of Transportation, A/SLMR No. 173. The record reveals that at the time the PATCO filed its petition for a nationwide unit on June 7, 1971, the controllers claimed herein were covered by a "multi-unit" negotiated agreement between the Activity and the Intervenor, Local R5-20, National Association of Government Employees, herein called NAGE, which also covered teletype operators and flight data aides.

In addition to presenting an issue as to the appropriateness of the claimed unit, the instant case presents two other issues: (1) whether the instant petition was filed timely within the meaning of Section 202.3(f) of the Assistant Secretary's Regulations in view of the fact that it was filed during the 12-month period following the close of the hearing in Federal Aviation Administration, Department of Transportation, cited above, which, as noted above, involved a petition for a nationwide unit of controllers, including the controllers covered by the subject petition; 1/ and (2) whether the petition herein is invalid and should be dismissed because it is inconsistent with the PATCO's prior petition for a nationwide unit.

The record reveals 2/ that on June 7, 1971, at the time the PATCO filed its petition for a nationwide unit, the controllers herein were covered by a negotiated agreement between the NAGE and the Activity which was awaiting approval at a higher management level. This agreement, of one year's duration, was approved on July 15, 1971. Subsequently, a hearing was held on the nationwide petition which closed on February 10, 1972. During the hearing, the NAGE, which intervened in

1/ Section 202.3(f) provides: "A petition for exclusive recognition or other petition for an election will not be considered timely if filed within a twelve (12) month period following the close of a hearing conducted pursuant to Section 202.9 concerning the unit or any subdivision thereof."

2/ All of the facts are derived from the parties' stipulation and accompanying exhibits.

the proceeding, contended that its negotiated agreement with the Activity constituted a bar to the inclusion in the nationwide unit of the controllers covered by such agreement. Following the close of the hearing, on April 25, 1972, the PATCO filed the petition herein. 3/ On July 20, 1972, the decision on the nationwide petition -- Federal Aviation Administration, Department of Transportation, cited above -- was issued by the Assistant Secretary. In that decision, I found that a residual nationwide unit of controllers was appropriate for the purpose of exclusive recognition under the Executive Order. I also determined that the negotiated agreement between the NAGE and the Activity which covered the controllers in the instant case barred the inclusion of such controllers in the nationwide unit found appropriate.

Under all the circumstances of this case, I find that the petition herein was filed timely. As noted above, when the PATCO filed its petition for a nationwide unit on June 7, 1971, the controllers herein already were covered by a valid negotiated agreement which was awaiting approval at a higher level of management. Such agreement, therefore, was found to constitute a bar to any election in the exclusively recognized unit. In my view, because the unit claimed herein could not be included in the nationwide unit sought by the PATCO, based on a procedural bar, and therefore, was excluded specifically from the unit found appropriate, it should not be viewed as a "subdivision" of the claimed nationwide unit within the meaning and intent of Section 202.3(f) of the Assistant Secretary's Regulations, but rather, it should be viewed as a separate appropriate unit. In this connection, Section 202.3(f), when read in conjunction with Sections 202.3(a) and (b) of the Assistant Secretary's Regulations, indicates an intent to reach a situation where a petition is dismissed by the Assistant Secretary after a unit determination hearing and within 12 months thereafter the same unit or subdivision thereof is petitioned for again. Where, as here, however, a petition is not dismissed but rather a unit is modified by the Assistant Secretary because of procedural bars to exclude an existing unit or units, such existing unit or units may be petitioned for at anytime thereafter in accordance with the appropriate timeliness requirements of the Assistant Secretary's Regulations and without regard to the bar established in Section 202.3(f). Under these circumstances, I find that the instant petition is not barred by Section 202.3(f) of the Assistant Secretary's Regulations.

The second issue raises the question as to whether the PATCO, in filing the petition for a nationwide unit and subsequently filing the petition herein for a local facility-wide unit was, in effect, taking inconsistent positions which would constitute an abuse of the administrative process under the Executive Order warranting dismissal of the

3/ The petition was filed during the 60 to 90 day period prior to the expiration of the negotiated agreement which covered the claimed unit.

instant petition. In this regard, the evidence establishes that although the PATCO attempted to include the employees in the claimed unit in the subject case in its proposed nationwide unit, the claimed unit already was covered by a valid negotiated agreement which the NAGE successfully contended constituted a bar to its inclusion in the nationwide unit. In view of the existence of a possible agreement bar, I find that the PATCO acted reasonably and did not abuse the administrative process by its attempt during the processing of its nationwide petition to protect its interest in the subject unit in the event its nationwide petition was found not to encompass the instant unit. Any other course of action could have resulted in the PATCO being precluded from raising a timely question concerning the representation in such unit for a substantial period of time. Under these circumstances, I find that the subject petition is not barred by virtue of the fact that the claimed employees were covered by the PATCO's nationwide petition.

The record reveals that the Activity granted the NAGE exclusive recognition for a unit of all of its nonsupervisory air traffic control specialists on December 14, 1965. On June 5, 1967, the Activity granted the NAGE exclusive recognition for a unit of all nonsupervisory teletype operators. Thereafter, on December 4, 1967, the recognition involving the unit of teletype operators was amended to include flight data aides. The NAGE and the Activity executed their only negotiated agreement involving these units on July 15, 1971. The parties stipulated that this agreement was a "multi-unit agreement" which included both of the recognized units. They also stipulated that the duties and responsibilities of the controllers, teletype operators and flight data aides are the same as the duties and responsibilities of the controllers, teletype operators and flight data aides in Federal Aviation Administration, Department of Transportation, cited above, wherein it was determined that the duties, skills, and responsibilities of controllers differed from those of the teletype operators and the flight data aides, and that the controllers had a separate and distinct community of interest which differed from that of the Activity's other employees.

Under all the circumstances, including the finding in Federal Aviation Administration, Department of Transportation, cited above, concerning the lack of community of interest between controllers and teletype operators and flight data aides, and in view of the fact that although covered under the same "multi-unit agreement," teletype operators and flight data aides at the Activity herein have been recognized in a unit separate from controllers, I find that a unit of controllers as petitioned for by the PATCO in the subject case is appropriate for the purpose of exclusive recognition under the

Order 4/ and that such unit will promote effective dealings and efficiency of agency operations. Accordingly, I shall direct that an election be conducted in the following unit:

> All nonsupervisory air traffic control specialists, employed at the Air Route Traffic Control Center, Hilliard, Florida, excluding teletype operators, flight data aides, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order. 5/

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found to be 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 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 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 Professional Air Traffic Controllers Organization, affiliated with Marine Engineers Beneficial Association, AFL-CIO; or Local R5-20, National Association of Government Employees; or neither.

Dated, Washington, D.C.
December 18, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

4/ As the evidence in this case establishes that the controllers and the teletype operators and flight data aides have been represented in separate units, I find that the principles set forth in United States Naval Construction Battalion Center, A/SLMR No. 8, regarding unit severance are inapplicable.

5/ The above unit is as established by the record herein with the addition of the standard exclusions set forth in Section 10(b) of the Executive Order.

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

FEDERAL AVIATION ADMINISTRATION,
RICHMOND AIR TRAFFIC CONTROL TOWER
(BYRD TOWER), ROANOKE AIR TRAFFIC
CONTROL TOWER, AND WASHINGTON AIR
ROUTE TRAFFIC CONTROL CENTER
A/SLMR No. 232

The subject cases involve representation petitions filed by the Professional Air Traffic Controllers Organization, affiliated with Marine Engineers Beneficial Association, AFL-CIO (PATCO) seeking elections in three units of employees currently represented by locals of the National Association of Government Employees (NAGE). The NAGE intervened in the three cases which involved air traffic control specialists employed at the Richmond Air Traffic Control Tower, the Roanoke Air Traffic Control Tower, and the Washington Air Route Traffic Control Center. The parties entered into stipulations setting forth all of the material facts and the cases were transferred by the Regional Administrator to the Assistant Secretary for decision.

Two issues were presented for decision: (1) whether the petitions were timely filed within the meaning of Section 202.3(f) of the Assistant Secretary's Regulations; and (2) whether the subject petitions, which sought facility-wide units, should be dismissed as being an abuse of the administrative process in view of the fact that they were filed at a time when a petition for a nationwide unit, which included the controllers claimed in the subject petitions, was pending.

The Assistant Secretary found that Section 202.3(f) of the Regulations was inapplicable to the subject petitions inasmuch as such petitions were filed prior to the close of the hearing on the nationwide petition. Accordingly, he found that the subject petitions were timely filed.

As to the second issue, the Assistant Secretary determined that for the reasons enunciated in Federal Aviation Administration, Jacksonville Air Route Traffic Control Center, A/SLMR No. 231, the petitions herein did not constitute an abuse of the administrative process. The Assistant Secretary noted that by filing the subject petitions the PATCO merely was attempting to protect its interest in such units in the event that its nationwide petition was found not to encompass them. Accordingly, the Assistant Secretary determined that each of the petitions was not barred.

Noting the agreement of the parties on the appropriateness of the units sought, the Assistant Secretary found the units appropriate for the purpose of exclusive recognition under the Order and directed an election in each unit.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL AVIATION ADMINISTRATION,
RICHMOND AIR TRAFFIC CONTROL TOWER
(BYRD TOWER)

Activity

and

Case No. 22-2701(RO)

RICHMOND TOWER CHAPTER, PROFESSIONAL
AIR TRAFFIC CONTROLLERS ORGANIZATION,
AFFILIATED WITH MARINE ENGINEERS
BENEFICIAL ASSOCIATION, AFL-CIO

Petitioner

and

LOCAL R4-21, NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES

Intervenor

FEDERAL AVIATION ADMINISTRATION,
ROANOKE AIR TRAFFIC CONTROL TOWER

Activity

and

Case No. 22-2835(RO)

ROANOKE AIR TRAFFIC CONTROL TOWER CHAPTER,
PROFESSIONAL AIR TRAFFIC CONTROLLERS
ORGANIZATION, AFFILIATED WITH MARINE
ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO

Petitioner

and

LOCAL R4-16, NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES

Intervenor

FEDERAL AVIATION ADMINISTRATION, WASHINGTON AIR ROUTE TRAFFIC CONTROL CENTER

Activity

and

Case No. 22-2924(RO)

WASHINGTON CENTER CHAPTER, PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION, AFFILIATED WITH MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO

Petitioner

and

LOCAL R3-18, NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES

Intervenor

DECISION AND DIRECTION OF ELECTIONS

This matter is before the Assistant Secretary pursuant to Regional Administrator W. J. R. Overath's Consolidated Order Transferring Cases to the Assistant Secretary of Labor pursuant to Sections 205.5(a) and 205.5(b) of the Assistant Secretary's Regulations.

Upon the entire record in these cases, including the parties' stipulation of facts, accompanying exhibits and a brief filed by the Petitioner, Professional Air Traffic Controllers Organization, affiliated with Marine Engineers Beneficial Association, AFL-CIO, herein called PATCO, the Assistant Secretary finds:

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

2. PATCO filed three representation petitions in the subject cases seeking elections in three separate units which are currently represented by locals of the National Association of Government Employees, herein called NAGE, and which are located at the Richmond, Virginia, Air Traffic Control Tower (Case No. 22-2701(RO); the Roanoke, Virginia, Air Traffic Control Tower (Case No. 22-2835(RO); and the Washington Air Traffic Control Center located at Leesburg, Virginia (Case No. 22-2924(RO)). In each case, the parties stipulated that the appropriate unit for the purpose of exclusive recognition consisted of all nonsupervisory air traffic control specialists, GS-2152 series, including flow controllers, area specialists, planning and procedures specialists, and military liaison and security specialists, excluding teletype operators, clericals, electronic technicians, evaluation and proficiency development specialists, flight data aides, cartographers, evaluation and proficiency development officers, facility chiefs, deputy chiefs, assistant chiefs, team supervisors, area officers, military security and liaison officers, data system officers, assistant data system officers, operations officers, planning officers, employees engaged in Federal personnel work in other than a purely clerical capacity, other management officials, supervisors, and guards as defined in the Order. 1/

Two issues were presented for decision: (1) whether the instant petitions are timely within the meaning of Section 202.3(f) of the Assistant Secretary's Regulations; 2/ and (2) whether the instant petitions are inconsistent with the prior petition for a nationwide unit filed by the PATCO on June 7, 1971 and, therefore, invalid.

The record reveals 3/ that on June 7, 1971, the PATCO filed a petition for a nationwide unit of air traffic control specialists, GS-2152 series, which included the controllers in the units sought in the instant proceeding. At the time the nationwide petition was filed the units claimed herein were covered by negotiated agreements between the Activity and the NAGE. Subsequently, the PATCO filed the instant

1/ The stipulated unit inclusions and exclusions are essentially the same as those included in and excluded from the unit found appropriate in Federal Aviation Administration, Department of Transportation, A/SLMR No. 173.

2/ Section 202.3(f) provides: "A petition for exclusive recognition or other petition for an election will not be considered timely if filed within a twelve (12) month period following the close of a hearing conducted pursuant to Section 209.9 concerning the unit or any subdivision thereof."

3/ All of the facts presented are derived from the parties' stipulation and accompanying exhibits.

petitions. 4/ Each of these petitions was filed during the 60 to 90 day period prior to expiration of the negotiated agreement that covered the unit claimed in the particular petition. Thereafter, on February 10, 1972, the hearing held on the nationwide petition closed. During that hearing, the NAGE, which participated as an intervenor, contended that the negotiated agreements which covered the subject units, constituted bars to the inclusion of such units in the nationwide unit sought by the PATCO. Subsequently, in Federal Aviation Administration, Department of Transportation, cited above, which was issued on July 20, 1972, I found that the nationwide unit sought by the PATCO was appropriate for the purpose of exclusive recognition under the Order. I also determined that the negotiated agreements between the NAGE and the Activity which covered the units sought by the instant petitions constituted bars to an election in such units and, consequently, the controllers in such units were excluded from the nationwide unit found appropriate.

As to the first issue raised by the stipulated record herein, the evidence establishes that the petitions filed in the subject cases were filed prior to the close of the hearing on the PATCO's petition for a nationwide unit. Accordingly, Section 202.3(f) of the Assistant Secretary's Regulations which, as noted above at footnote 2, provides that a petition for exclusive recognition will not be considered timely if filed within a twelve (12) month period following the close of a hearing concerning the unit or any subdivision thereof, is clearly inapplicable to the petitions in this proceeding. 5/ In these circumstances, I find that the subject petitions were filed timely.

The second issue raised the question as to whether the PATCO, in filing its petition for a nationwide unit and subsequently filing local petitions for facility-wide units, was, in effect, taking inconsistent positions which would constitute an abuse of the administrative process under the Executive Order warranting dismissal of the subject petitions. For the reasons enunciated in Federal Aviation Administration, Jacksonville Air Route Traffic Control Center, cited above, I find that the PATCO acted reasonably and did not abuse the administrative process by its attempt during the processing of its nationwide petition to protect its interest in the subject units in the event that its nationwide petition was found not to encompass such units. Accordingly, I find that the petitions herein are not barred by virtue of the fact that the claimed employees were covered by the PATCO's nationwide petition.

4/ The petition in Case No. 22-2701(RO) was filed on August 20, 1971; the petition in Case No. 22-2835(RO) was filed on September 22, 1971; and the petition in Case No. 22-2924(RO) was filed on December 13, 1971.

5/ Moreover, even assuming that the subject petitions were filed following the close of the hearing they would be viewed as timely filed. See Federal Aviation Administration, Jacksonville Air Route Traffic Control Center, A/SLMR No. 231.

Based on the foregoing, and noting the agreement of the parties on the appropriateness of the units sought, I find that the claimed units are appropriate for the purpose of exclusive recognition under the Order and will promote effective dealings and efficiency of agency operations. Accordingly, I shall direct an election in each of the units sought at the Richmond Air Traffic Control Tower; the Roanoke Air Traffic Control Tower; and the Washington Air Route Traffic Control Center at Leesburg, Virginia. The following unit description should be utilized at each of the locations involved with the name of the appropriate Activity inserted:

> All nonsupervisory air traffic control specialists, GS-2152 series, including flow controllers, area specialists, planning and procedures specialists and military liaison and security specialists; excluding teletype operators, clericals, electronic technicians, evaluation and proficiency development specialists, flight data aides, cartographers, evaluation and proficiency development officers, facility chiefs, deputy chiefs, assistant chiefs, team supervisors, area officers, military security and liaison officers, data system officers, assistant data system officers, operations officers, planning officers, employees engaged in Federal personnel work in other than a purely clerical capacity, other management officials, and supervisors and guards as defined in the Order.

DIRECTION OF ELECTIONS

An election by secret ballot shall be conducted among employees in each of 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 election subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including the employees who did not work during the period because they were out ill or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the Richmond Tower Chapter, the Roanoke Air Traffic Control Tower Chapter, or the Washington Center Chapter (as appropriate), Professional Air Traffic

Controllers Organization, affiliated with Marine Engineers Beneficial Association, AFL-CIO; by Locals R4-21, R4-16, or R3-18 (as appropriate), National Association of Government Employees; or by neither.

Dated, Washington, D.C.
December 18, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

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

FEDERAL AVIATION ADMINISTRATION,
MINNEAPOLIS AIR ROUTE TRAFFIC CONTROL CENTER,
FARMINGTON, MINNESOTA
A/SLMR No. 233

The subject case involves a representation petition filed by the Professional Air Traffic Controllers organization, affiliated with Marine Engineers Beneficial Association, AFL-CIO (PATCO) seeking an election in a unit of the Activity's air traffic control specialists (controllers) currently represented by Local R9-2, National Association of Government Employees (NAGE) which intervened in the case. The parties entered into a stipulation setting forth all material facts and the case was transferred by the Regional Administrator to the Assistant Secretary for decision.

Two issues were presented for decision: (1) whether the petition was timely filed within the meaning of Section 202.3(f) of the Assistant Secretary's Regulations in view of the fact that it was filed during the twelve (12) month period following the close of the hearing on a petition for a nationwide unit of controllers which included the controllers in the unit in the instant case; and (2) whether the subject petition, which sought a facility-wide unit, should be dismissed as being an abuse of the administrative process in view of the fact that it was filed at a time when the petition for a nationwide unit of controllers was pending.

The Assistant Secretary found, in accord with his decision in Federal Aviation Administration, Jacksonville Air Route Traffic Control Center, A/SLMR No. 231, that because the employees in the subject unit could not be included in the nationwide unit sought in the prior petition because they were covered by a valid negotiated agreement at the time such petition was filed which barred them from participating in a representation election, the unit sought herein is not a "subdivision" of the nationwide unit within the meaning of Section 202.3(f), but rather is a separate appropriate unit. Accordingly, the Assistant Secretary found that the petition was not barred by Section 202.3(f) of the Assistant Secretary's Regulations.

As to the second issue, the Assistant Secretary found in accord with his decision in Federal Aviation Administration, Jacksonville Air Route Control Center, cited above, that in view of the fact that at the time the PATCO filed its petition for a nationwide unit, the subject unit was covered by a negotiated agreement which possibly barred its inclusion in the nationwide unit, the instant petition did not constitute an abuse of the administrative process. Accordingly, the Assistant Secretary determined that the petition was valid.

Noting the agreement of the parties on the appropriateness of the unit sought, the Assistant Secretary found the unit was appropriate for the purpose of exclusive recognition under the Order and directed an election in the unit.

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UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL AVIATION ADMINISTRATION,
MINNEAPOLIS AIR ROUTE TRAFFIC CONTROL CENTER,
FARMINGTON, MINNESOTA

Activity

and

Case No. 51-2243

PROFESSIONAL AIR TRAFFIC CONTROLLERS
ORGANIZATION, AFFILIATED WITH
MARINE ENGINEERS BENEFICIAL ASSOCIATION,
AFL-CIO

Petitioner

and

LOCAL R9-2 ,, NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES

Intervenor

DECISION AND DIRECTION OF ELECTION

This matter is before the Assistant Secretary pursuant to Regional Administrator Abraham S. Friedman's Order Transferring Case to the Assistant Secretary pursuant to Section 205.5(a) and 205.5(b) of the Assistant Secretary's Regulations.

Upon the entire record in this case, including the parties' stipulation of facts, accompanying exhibits and a brief filed by the Petitioner, Professional Air Traffic Controllers Organization, affiliated with Marine Engineers Beneficial Association, AFL-CIO, herein called PATCO, the Assistant Secretary finds:

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

2. PATCO seeks an election in a unit which is currently represented by Local R9-2, National Association of Government Employees, herein called NAGE. In this case the parties stipulated that the appropriate unit for the purpose of exclusive recognition consists of all air traffic control

specialists, GS-2152 series, including flow controllers, area specialists, planning and procedures specialists and military liaison and security specialists employed by the Activity at the Minneapolis Air Route Traffic Control Center, Farmington, Minnesota, excluding teletype operators, clericals, electronic technicians, evaluation and proficiency development specialists, flight data aides, cartographers, evaluation and proficiency development officers, facility chief, deputy chief, assistant chiefs, team supervisors, area officers, military security and liaison officers, data system officers, assistant data system officers, operations officers, planning officers, employees engaged in Federal personnel work in other than a purely clerical capacity, other management officials and supervisors, and guards as defined in the Order, as amended. 1/

Two issues were presented for decision: (1) whether the instant petition is timely within the meaning of Section 202.3(f) of the Assistant Secretary's Regulations; 2/ and (2) whether the instant petition is inconsistent with the petition for a nationwide unit filed by the PATCO on June 7, 1971, and, therefore, invalid.

The record reveals 3/ that the PATCO filed a petition on June 7, 1971, for a nationwide unit of controllers which included the controllers in the unit sought in the subject case. At the time the petition for the nationwide unit was filed, the controllers involved in this case were covered by a valid negotiated agreement between the Activity and the NAGE. A hearing was held on the nationwide petition, and during the hearing the NAGE, which intervened in the proceeding, contended that the negotiated agreement constituted a bar to the inclusion of the controllers covered by the instant petition in the nationwide unit. The hearing closed on February 10, 1972, and on April 14, 1972, the PATCO filed the subject petition during the 60 to 90 day period prior to the expiration of the aforementioned negotiated agreement. Subsequently, in Federal Aviation Administration, Department of Transportation, cited above, which was issued on July 20, 1972, I found that the nationwide unit sought by the PATCO was appropriate for the purpose of exclusive recognition. I found also that the negotiated agreement between the NAGE and the Activity, which covered the unit involved herein, constituted a bar to an election in such unit, and, consequently, the controllers in the unit were excluded from the nationwide unit.

1/ The stipulated unit inclusions and exclusions are essentially the same as those included in and excluded from the unit found appropriate in Federal Aviation Administration, Department of Transportation, A/SLMR No. 173.

2/ Section 202.3(f) provides: "A petition for exclusive recognition or other petition for an election will not be considered timely if filed within a twelve (12) month period following the close of a hearing conducted pursuant to Section 209.9 concerning the unit or any subdivision thereof."

3/ All of the facts presented are derived from the parties' stipulation and accompanying exhibits.

For the reasons enunciated in Federal Aviation Administration, Jacksonville Air Route Traffic Control Center, A/SLMR No. 231, I find that the petition herein is not barred by Section 202.3(i) of the Assistant Secretary's Regulations. The evidence in the instant case establishes that at the time the PATCO filed its petition for a nationwide unit, the controllers herein were covered by a valid negotiated agreement which precluded their inclusion in the nationwide unit. Thus, in my view, because the claimed unit could not be included in the nationwide unit sought by the PATCO and was specifically excluded from the unit found appropriate, it could not be considered a "subdivision" of the nationwide unit within the meaning of Section 202.3(f), but rather is a separate appropriate unit. Consequently, I find the petition herein is not barred by Section 202.3(f) of the Regulations of the Assistant Secretary.

The second issued raised the question as to whether the PATCO, in filing its petition for a nationwide unit and subsequently filing the instant petition for a local facility-wide unit, was, in effect, taking an inconsistent position which would constitute an abuse of the administrative processes under the Executive Order warranting the dismissal of the subject petition. The record establishes that while the PATCO attempted to include the unit claimed herein in a nationwide unit, such unit was already covered by a valid negotiated agreement which the NAGE successfully asserted constituted a bar to its inclusion in the nationwide unit. Based upon the reasons set forth in Federal Aviation Administration, Jacksonville Air Route Traffic Control Center, cited above, I find that the PATCO acted reasonably and did not abuse the administrative process by filing the petition in the subject case. Accordingly, I find the petition herein is not barred by virtue of the fact that the claimed employees were covered by the PATCO's prior petition for a nationwide unit.

Based on the foregoing, and noting the agreement of the parties on the appropriateness of the unit sought, I find that the claimed unit is appropriate for the purpose of exclusive recognition and will promote effective dealings and efficiency of agency operations. Accordingly, I shall direct an election in the following unit:

> All nonsupervisory air traffic control specialists, GS-2152 series, including flow controllers, area specialists, planning and procedures specialists and military liaison and security specialists employed at the Minneapolis Air Route Traffic Control Center, Farmington, Minnesota, excluding teletype operators, clericals, electronic technicians, evaluation and proficiency development specialists, flight data aides, cartographers, evaluation and proficiency development officers, facility chief, deputy chief, assistant chiefs, team supervisors, area officers, military security and liaison officers, data system officers, assistant data system officers, operations officers, planning officers, employees engaged in Federal personnel work

in other than a purely clerical capacity, other management officials, and supervisors and guards as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among employees in the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including the employees who did not work during the period because they were out ill or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the Professional Air Traffic Controllers Organization, affiliated with the Marine Engineers Beneficial Association, AFL-CIO; Local R9-2, National Association of Government Employees; or neither.

Dated, Washington, D. C.
December 18, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

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

FEDERAL AVIATION ADMINISTRATION, SOUTHERN REGION, MIAMI AIR ROUTE TRAFFIC CONTROL CENTER AND MIAMI AIRPORT TRAFFIC CONTROL TOWER
A/SLMR No. 234

The subject cases involve petitions filed by the Professional Air Traffic Controllers Organization, affiliated with Marine Engineers Beneficial Association, AFL-CIO (PATCO), and the Activities seeking elections in two units of employees currently represented by the National Association of Government Employees (NAGE). The NAGE intervened in the cases which involve air traffic control specialists employed at the Miami Airport Traffic Control Tower and controllers and teletype operators employed at the Miami Air Route Traffic Control Center. The parties entered into stipulations setting forth all of the material facts and the cases were transferred by the Regional Administrator to the Assistant Secretary for decision.

Three issues were presented for decision: (1) whether the petitions were filed timely within the meaning of Section 202.3(f) of the Assistant Secretary's Regulations; (2) whether the PATCO's petitions, which sought facility-wide units, should be dismissed as being an abuse of the administrative process in view of the fact that they were filed at a time when a petition for a nationwide unit, which included the controllers claimed in the instant petitions, was pending; and (3) whether the controllers at the Miami Air Route Traffic Control Center should be severed from the existing unit of controllers and teletype operators.

The Assistant Secretary determined, in accord with his decision in Federal Aviation Administration, Richmond Air Traffic Control Tower (Byrd Tower); Roanoke Air Traffic Control Tower; and Washington Air Route Traffic Control Center, A/SLMR No.232 , that Section 202.3(f) of the Regulations was inapplicable to the subject petitions as such petitions were filed prior to the close of the hearing on the nationwide petition. Accordingly, he found that the instant petitions were timely filed.

As to the second issue, the Assistant Secretary found in accord with his decision in Federal Aviation Administration, Jacksonville Air Route Traffic Control Center, A/SLMR No. 231 , that the PATCO's petitions herein did not constitute an abuse of the administrative process under the Order. He noted that the PATCO, by filing its petitions in the subject cases, and also attempting at the same time to include such units in the nationwide unit, was protecting its interest in the subject

cases in the event its nationwide petition was found not to include such units. Accordingly, the Assistant Secretary determined that the PATCO's petitions were valid.

Regarding the third issue, the Assistant Secretary determined that the policy set forth in United States Naval Construction Battalion Center, A/SLMR No. 8, was controlling. In that decision the Assistant Secretary found that where there was in existence an established, effective and fair collective bargaining relationship, a separate unit carved out of an existing unit would not be found to be appropriate, except in unusual circumstances. The Assistant Secretary found that the evidence established that the existing unit of controllers and teletype operators had an established history of fair and effective collective-bargaining and that there was no evidence that either the teletype operators or the controllers in the unit had been represented in other than a fair and effective manner. The Assistant Secretary found further that the Activities' contentions--that if the existing unit remains intact and the PATCO should become the bargaining agent, such unit could become a disruptive element in the bargaining relationship between them and the PATCO and that the interests of the teletype operators might suffer since substantially all of the other employees represented by the PATCO are controllers--were entirely speculative and, therefore, without merit. In reaching this conclusion, the Assistant Secretary noted that the PATCO had expressed a willingness to represent the employees in any unit deemed appropriate by the Assistant Secretary. Accordingly, the Assistant Secretary concluded that severance of the controllers from the existing unit was unwarranted and directed an election in the established unit which included teletype operators and controllers.

Finally, noting the agreement of the parties as to the appropriateness of the unit sought at the Miami Airport Traffic Control Tower, the Assistant Secretary found the unit appropriate for the purpose of exclusive recognition under the Order and directed an election in such unit. Also, based on the foregoing, he directed an election in a unit of nonsupervisory teletypists and air traffic control specialists at the Air Route Traffic Control Center, Miami, Florida.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL AVIATION ADMINISTRATION, SOUTHERN REGION, MIAMI AIR ROUTE TRAFFIC CONTROL CENTER

Activity-Petitioner

and Case No. 42-1620(RA)

LOCAL R5-7, NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES

Labor Organization

FEDERAL AVIATION ADMINISTRATION, MIAMI AIR ROUTE TRAFFIC CONTROL CENTER

Activity

and Case No. 42-1648(RO)

MIAMI CENTER CHAPTER, PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION, AFFILIATED WITH MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO

Petitioner

and

LOCAL R5-7, NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES

Intervenor

FEDERAL AVIATION ADMINISTRATION, SOUTHERN REGION, MIAMI AIRPORT TRAFFIC CONTROL TOWER

Activity-Petitioner

and Case No. 42-1724(RA)

LOCAL R5-55, NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES

Labor Organization

FEDERAL AVIATION ADMINISTRATION, SOUTHERN REGION, MIAMI AIRPORT TRAFFIC CONTROL TOWER

Activity

and Case No. 42-1759(RO)

MIAMI TOWER CHAPTER, PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION, AFFILIATED WITH MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO

Petitioner

and

LOCAL R5-55, NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES

Intervenor

DECISION AND DIRECTION OF ELECTIONS

This matter is before the Assistant Secretary pursuant to Regional Administrator J. Y. Chennault's Consolidated Order Transferring Cases to the Assistant Secretary of Labor pursuant to Section 205.5(a) and 205.5(b) of the Assistant Secretary's Regulations.

Upon the entire record in these cases, including the parties' stipulation of facts, accompanying exhibits, and briefs filed by the Professional Air Traffic Controllers Organization, affiliated with Marine Engineers Beneficial Association, AFL-CIO, herein called PATCO, and the Activities, the Assistant Secretary finds:

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

2. PATCO filed two separate petitions in Cases Nos. 42-1648(RO) and 42-1759(RO) seeking elections in two units which are currently represented by locals of the National Association of Government Employees, herein called NAGE, and which are located at the Miami Air Route Traffic Control Center (Case No. 42-1648(RO)) and the Miami Airport Traffic Control Tower (Case No. 42-1759(RO)). Also, the

Activities filed petitions in the same units (Case No. 42-1724(RA) in the Miami Airport Traffic Control Tower unit, and Case No. 42-1620(RA) in the Miami Air Route Traffic Control Center) questioning the majority status of the NAGE in such units. The parties stipulated that the appropriate unit for exclusive recognition in Cases Nos. 42-1724(RA) and 42-1759(RO) consists of all nonsupervisory air traffic control specialists, GS-2152 series, including flow controllers, area specialists, planning and procedures specialists and military liaison and security specialists employed at the Miami Air Traffic Control Tower, excluding teletype operators, clericals, electronic technicians, evaluation and proficiency development specialists, flight data aides, cartographers, evaluation and proficiency development officers, facility chiefs, deputy chiefs, assistant chiefs, team supervisors, area officers, military liaison and security officers, data system officers, assistant data system officers, operations officers, planning officers, employees engaged in Federal personnel work in other than a purely clerical capacity, other management officials and supervisors and guards as defined in the Order. 1/

In Case No. 42-1648(RO) the PATCO seeks a unit consisting of all nonsupervisory controllers, regardless of grade, including data system specialists, employed at the Miami Air Route Traffic Control Center, excluding evaluation, proficiency and development specialists, flow controllers, teletypists, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and guards and supervisors as defined in the Order. The unit in which the Activity questioned the majority status of the NAGE in Case No. 42-1620(RA) was coextensive with the existing bargaining unit at the Miami Air Route Traffic Control Center which included teletype operators as well as controllers. However, in its brief, the Activity contended that the controllers should be severed from the existing unit because the controllers and teletype operators constitute separate appropriate units and severance will promote stability in labor relations, as well as effective dealings and efficiency in agency operations. In its brief, the PATCO took no position on the severance issue but expressed a willingness to represent the employees in any unit found appropriate by the Assistant Secretary.

In addition to the issue raised as to the appropriateness of the unit in Cases Nos. 42-1648(RO) and 42-1620(RA), the subject cases present two other issues for decision: (1) whether the instant petitions are timely within the meaning of Section 202.3(f) of the Assistant Secretary's Regulations; 2/ and (2) whether the PATCO's petitions herein are

1/ The stipulated inclusions and exclusions are essentially the same as those included in and excluded from the unit found appropriate in Federal Aviation Administration, Department of Transportation, A/SLMR No. 173.

2/ Section 202.3(f) provides: "A petition for exclusive recognition or other petition for an election will not be considered timely if filed within a twelve (12) month period following the close of a hearing conducted pursuant to Section 209.9 concerning the unit or any subdivision thereof."

inconsistent with its prior petition for a nationwide unit filed on June 7, 1971, and, therefore, invalid.

The record reveals 3/ that on June 7, 1971, the PATCO filed a petition for a nationwide unit of air traffic control specialists, GS-2152 series, which included the controllers sought by the PATCO herein. At the time the nationwide petition was filed, the units claimed in the instant proceeding were covered by valid negotiated agreements between the Activity and the NAGE. During the hearing on the nationwide petition, the NAGE, which participated as an intervenor, contended that the negotiated agreements which covered the instant units constituted bars to their inclusion in the nationwide unit sought by the PATCO. The hearing closed on February 10, 1972. Prior to the close of the hearing the PATCO and the Activities filed the instant petitions. Each petition was filed during the 60 to 90 day period prior to the expiration of the negotiated agreements which covered the claimed units. Subsequently, in Federal Aviation Administration, Department of Transportation, A/SLMR No. 173, which was issued on July 20, 1972, I found that the nationwide unit sought by the PATCO was appropriate for the purpose of exclusive recognition under the Order. I found also that the negotiated agreements which covered the units claimed herein constituted bars to an election in such units and, consequently, the controllers in such units were excluded from the nationwide unit found appropriate.

As to the first issue raised by the stipulated record herein, the evidence establishes that the petitions filed in the subject cases were filed prior to the close of the hearing on the PATCO's petition for a nationwide unit. Accordingly, for the reasons enunciated in Federal Aviation Administration, Richmond Air Traffic Control Tower (Byrd Tower); Roanoke Air Traffic Control Tower; and Washington Air Route Traffic Control Center, A/SLMR No.232, I find that Section 202.3(f) of the Assistant Secretary's Regulations is inapplicable to the petitions in this proceeding. Accordingly, I find that the subject petitions were filed timely.

The second issue raised the question as to whether the PATCO, in filing its petition for a nationwide unit and, subsequently, filing the local petitions herein for facility-wide units was, in effect, taking inconsistent positions which would constitute an abuse of the administrative process under the Executive Order warranting the dismissal of the subject petitions. The record establishes that while the PATCO attempted to include the units claimed herein in a nationwide unit, such units already were covered by valid negotiated agreements which the NAGE successfully asserted constituted bars to their inclusion in the nationwide unit. Based upon the reasons set forth in Federal Aviation Administration, Jacksonville Air Route Traffic Control Center, A/SLMR No. 231, I find that the PATCO acted reasonably and did not abuse the administrative process by filing the petitions in the subject cases. Accordingly, I find that the PATCO's petitions in the subject cases are not barred by virtue of the fact that the claimed employees were covered by the PATCO's prior petition for a nationwide unit.

With respect to the severance issue, the evidence reveals that the Activity accorded the NAGE recognition as exclusive bargaining representative of the controllers and teletype operators employed at the Miami Air Route Traffic Control Center on January 6, 1965. The NAGE and the Activity executed the only negotiated agreement covering the unit on August 6, 1969. The parties stipulated that there was no evidence that the NAGE had failed to represent either the controllers or the teletype operators in a fair and effective manner. The parties also stipulated that the duties and responsibilities of the teletype operators and controllers at the Miami Center are the same as the duties and responsibilities of the controllers and teletype operators in Federal Aviation Administration, Department of Transportation, cited above.

In United States Naval Construction Battalion Center, A/SLMR No. 8, I found that where the evidence shows the existence of an established, effective bargaining relationship, severance from an established unit will not be granted, absent unusual circumstances. The Activity contends that the subject case presents unusual circumstances which warrant severance of the controllers from the existing unit. It argues in this regard that because the collective bargaining relationship between it and the PATCO currently involves only units restricted to controllers and the PATCO does not seek affirmatively to represent teletype operators, the inclusion of teletype operators in the unit herein would constitute an unwarranted and burdensome intrusion in the relationship between it and the PATCO. It argues also that if the teletype operators are permitted to remain in the unit, and if the PATCO should become the exclusive bargaining representative, the interests of the teletype operators may suffer because practically all of the other employees represented by the PATCO are controllers.

In my view, the apprehensions raised by the Activity are totally speculative. Thus, the PATCO has expressed a willingness to represent the employees in whatever unit is deemed appropriate, and there is no evidence that it will not represent all employees in such unit in a fair and effective manner. Moreover, these employees have historically been included in the same unit and there is no record evidence that such unit has failed to promote effective dealings and efficiency of agency operations. Accordingly, and as the record herein does not, in my view, establish any unusual circumstances justifying the severance of controllers from the existing unit, I find that the appropriate unit includes both the controllers and teletype operators, and I shall direct an election in such unit. 4/

3/ All of the facts presented are derived from the parties' stipulation and accompanying exhibits.

4/ Cf. Federal Aviation Administration, Department of Transportation, A/SLMR No. 122, at footnote 9.

Based on the foregoing circumstances, I find that the following employees at the Miami Air Route Traffic Control Center constitute an appropriate unit for the purpose of exclusive recognition and that such unit will promote effective dealings and efficiency of agency operations:

> All nonsupervisory teletypists and air traffic control specialists assigned to the Air Route Traffic Control Center, Miami, Florida, excluding facility officers, supervisory air traffic control specialists (Watch Supervisors), supervisory air traffic control specialists (Crew Chiefs), supervisory air traffic control specialists (Flight Data Supervisors), teletypist supervisors, flight data aides, office administrative and clerical personnel, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order. 5/

Further, under all the circumstances and noting the agreement of the parties with respect to the appropriateness of the unit sought, I find that the following unit is appropriate for the purpose of exclusive recognition and will promote effective dealings and efficiency of agency operations:

> All nonsupervisory air traffic control specialists, GS-2152 series, including flow controllers, area specialists, planning and procedures specialists, military liaison and security specialists employed at the Miami Airport Traffic Control Tower, excluding teletype operators, clericals, electronic technicians, evaluation and proficiency development specialists, flight data aides, cartographers, evaluation and proficiency development officers, facility chiefs, deputy chiefs, assistant chiefs, team supervisors, area officers, military security and liaison officers, data system officers, assistant data system officers, operations officers, planning officers, employees engaged in Federal personnel work in other than a purely clerical capacity, other management officials, and supervisors and guards as defined in the Order.

5/ The above unit is as described in the parties' negotiated agreement with the addition of the standard exclusions set forth in Section 10(b) of the Executive Order.

DIRECTION OF ELECTIONS

Elections by secret ballot shall be conducted among employees in each of 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 the employees who did not work during the period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

Eligible employees at the Miami Air Route Traffic Control Center shall vote whether they desire to be represented for the purpose of exclusive recognition by the Miami Center Chapter, Professional Air Traffic Controllers Organization, affiliated with Marine Engineers Beneficial Association, AFL-CIO; Local R5-7, National Association of Government Employees, or neither.

Eligible employees at the Miami Airport Traffic Control Tower shall vote whether they desire to be represented for the purpose of exclusive recognition by the Miami Tower Chapter, Professional Air Traffic Controllers Organization, affiliated with Marine Engineers Beneficial Association, AFL-CIO; Local R5-55, National Association of Government Employees; or neither.

Dated, Washington, D.C.
December 18, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

REPORTS ON RULINGS

OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

Nos. 44 - 52

January 1, 1972, through December 31, 1972

January 17, 1972

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR MANAGEMENT RELATIONS
REPORT ON A RULING OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491

Report Number 44

Problem

The question was raised as to whether a unit consisting of a single employee was appropriate for purposes of collective bargaining within the meaning of Executive Order 11491, as amended.

Ruling

All references to units in the Order and the implementing regulations issued by the Assistant Secretary refer to "employees". It was decided that units of more than one employee were contemplated by the Order and consequently that a single employee unit is not appropriate for purposes of collective bargaining.

January 20, 1972

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
REPORT ON A RULING OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491

Report Number 45

Problem

The question was raised as to whether a Regional Administrator correctly decided that a Petitioner had not complied with the service requirements of Section 202.2(e)(3) when it failed to make simultaneous service of a copy of its petition on the union representing employees covered by the petition. Both the Area Administrator and the Activity were served simultaneously with copies of the petition, but the exclusive representative was not served until a week later.

Decision

Since service of a copy of the petition on an interested party one week after timely service upon the Area Administrator and the Activity was not in compliance with the simultaneous service requirements of Section 202.2(e)(3), the request to reverse the Regional Administrator's dismissal of the petition for election was denied.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
REPORT ON A RULING OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491

Report Number 46

Problem

A Complainant in an unfair labor practice case failed to furnish requested information required by the Regulations (e.g., time and place of occurrence of alleged acts) prior to the issuance of the Regional Administrator's dismissal of its complaint. The request for review introduced the necessary information for the first time. The question was raised whether or not such information should be considered by the Assistant Secretary.

Decision

Consistent with Report on Ruling No. 22, and Charleston, South Carolina Veterans Administration Hospital, A/SLMR No. 87, evidence or information required by the Regulations that is furnished for the first time in a request for review, where a Complainant has had adequate opportunity to furnish it during the investigation period (provided for in Section 203.5 of the Regulations) and prior to the issuance of the Regional Administrator's decision, shall not be considered by the Assistant Secretary.

January 20, 1972

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
REPORT ON A RULING OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491

Report Number 47

Problem

A Complainant in an unfair labor practice case refused to cooperate in furnishing information required by the Regulations and necessary in order for the Area and Regional Administrators to determine such items as timeliness of charges and filing of complaint. The question was raised whether or not such a case should continue to be processed and a decision on its merits be made.

Decision

In Brockton, Massachusetts Veterans Administration Hospital, A/SLMR No. 21, the Assistant Secretary enunciated the policy that it would best effectuate the purposes of the Executive Order and would promote the prompt handling of cases to dismiss where a Petitioner refuses to cooperate in the processing of his petition. This policy applies equally well to a similar lack of cooperation by a Complainant in an unfair labor practice case.

Therefore, failure of a Complainant to cooperate during the investigation of an unfair labor practice case may subject its complaint to dismissal.

January 20, 1972

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
REPORT ON A RULING OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491

Report Number 48

Problem

Complainants in some cases have been submitting to the Area Offices unfair labor practice complaint forms incompletely filled out. For example, Item No. 2 of the form, "Basis of the Complaint", has been left blank except for such phrases as "see attached correspondence". On occasion necessary items of information, such as the dates and places of the particular acts complained of, have not been supplied. In one case, a complaint was submitted without the signature required under Part 203 of the Regulations. The question was raised whether such complaints are valid and whether they should be docketed when received by the Area Offices. A related question is whether the date of receipt of such deficient complaints should be considered to be the filing date when computing the timeliness requirements under Part 203 of the Regulations.

Decision

The complaint form itself must set forth the particular acts complained of along with attendant details. Therefore, use of phrases such as "see attached correspondence", renders an otherwise adequate complaint invalid. Further, a complaint which lacks a signature in Item No. 7 of the form is unacceptable. Forms containing such deficiencies should not be accepted or docketed by the Area Offices. In this connection, the date to be used in computing timeliness requirements is that date when a valid, properly filled out complaint form is received by the Area Office.

February 15, 1972

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
REPORT ON A RULING OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491

Report Number 49

Problem

A request for review was filed seeking reversal of the Acting Regional Administrator's dismissal of a complaint alleging violations of Section 19(a) of the Executive Order stemming from an Activity's refusal to accept a labor organization's interpretation regarding the number of stewards the Activity was required to recognize under an existing collective bargaining agreement. The evidence indicated a disagreement between the parties over the interpretation of the agreement and that the agreement provides a grievance and arbitration procedure for resolving such disputes.

Decision

It was concluded 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.

February 29, 1972

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
REPORT ON A RULING OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491

Report Number 50

Problem

Subsequent to losing a runoff representation election, the Petitioner filed objections to conduct allegedly affecting the results of the runoff election based on an event occurring prior to the first election. No objections had been filed to the first election. The question was raised whether an objection based on such an event should be considered in evaluating objections filed to the runoff election.

Decision

The critical period preceding a runoff election during which objectionable conduct of one party may be used as grounds for setting aside the runoff election begins running from the date of the first election. Conduct occurring prior to the first election, and not urged as objections to that election, may not be considered as grounds for setting aside the runoff election, except in unusual circumstances.

August 17, 1972

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
REPORT ON A RULING OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

Report Number 51

Problem

The question was presented whether a challenge to the eligibility of employees to vote could be raised as an objection to the election after the close of the polls and the ballots of the questioned employees had been cast without challenge by any observer and commingled with the ballots of other voters.

Decision

A challenge to the eligibility of voters must be made prior to the casting of the ballots and not after the ballots have been cast without challenge and their identity lost by commingling with other valid ballots. After the ballot is cast unchallenged, the privilege of challenging it is lost and cannot be revived, regardless of the merits of after thoughts which may occur to the parties. The objection to the election filed in this case was in fact a challenge to eligibility of voters and not an objection to the election. The proper distinction between "challenges" and "objections" is that objections relate to the working of the election mechanisms and the counting of ballots accurately and fairly while challenges relate to the eligibility of prospective voters.

August 18, 1972

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
REPORT ON A RULING OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

Report Number 52

Problem

The question was raised whether a showing of interest in support of a petition for an election was valid where obtained by solicitation of a single signature to a dual purpose form which bore two unrelated headings, (1) acknowledging receipt of a publication and (2) authorizing a labor organization to represent employees for purposes of exclusive representation.

Decision

The technique of obtaining signatures on dual purpose documents inherently is confusing and the resultant signatures are, therefore, unreliable and unacceptable as evidence of interest.

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